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DEFENSE ENVIRONMENTAL RESPONSE TASK FORCE  
VOLUME II  
FEBRUARY 3, 1999

ORIGINAL

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TASK FORCE MEMBERS:

MS. KARLA PERRI  
Assistant Deputy Under Secretary of  
Defense, U.S. Department of Defense;

MR. STAN PHILLIPPE  
California Environmental Protection  
Agency;

MR. WILLIAM D. GRAY  
The Environment and Energy Study  
Institute;

MR. BRIAN K. POLLY  
Assistant Commissioner,  
U.S. General Services Administration;

MR. J. STEVEN ROGERS  
Acting Counsel for State and Local  
Affairs, Environment and Natural  
Resources Division, United States  
Department of Justice;

MR. JIM WOOLFORD  
U.S. Environmental Protection Agency;

MR. THOMAS EDWARDS  
State Attorney General's Office,  
State of Texas;

GEN. MILTON HUNTER  
U.S. Army Corps of Engineers;

MR. PAUL O. REIMER  
Reimer Associates,  
Representative of the Urban Land  
Institute.

\* \* \* \* \*

1                   On the 3rd day of February, A.D.  
2                   1999, at the Cathedral Hill Hotel,  
3                   1101 Van Ness Avenue, in San Francisco,  
4                   California, the above entitled meeting came on  
5                   for discussion before said KARLA PERRI, and the  
6                   following proceedings were had:

7                   MR. CHOUDHURY: Please take your  
8                   seats so that the meeting can resume.

9                   My name is Shah Choudhury and I'm the  
10                  Executive Direct -- sorry -- Executive  
11                  Secretary of the Defense Environmental Response  
12                  Task Force.

13                  Please take your seats. If you're  
14                  involved in a conversation, please take it  
15                  outside this room.

16                  A few administrative announcements before  
17                  we start. This meeting is compliant with the  
18                  provisions of the Federal Advisory Committee  
19                  Act. This meeting is open to the public. We  
20                  do have a stenographer assisting in keeping the  
21                  record, so I do ask that you speak one at a  
22                  time and use the microphone for all statements  
23                  and questions. I also request that you state  
24                  your name and affiliation so that we can keep a  
25                  record.

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1                   There is going to be a public comment

2 session this evening, starting at 4:30 --  
3 sorry -- 5:30 -- and going on until 8:30. If  
4 you so desire to speak, please fill out one of  
5 the purple cards on the information table  
6 outside this room and hand the completed card  
7 to me. We are going to give preference to  
8 those that haven't spoken before the DERTF and  
9 we will be calling them out in the order that I  
10 receive the cards. And if time allows, we  
11 will, then, call up people that have spoken  
12 previously, in alphabetical order.

13 The DERTF members should have found four  
14 handouts at their places as they came in. The  
15 first two are in regard to the presentation --  
16 the panel that will be starting immediately  
17 after my announcements -- and the other two  
18 were from the BADCAT technology presentation  
19 that was provided earlier.

20 At this time, let me introduce  
21 Thomas Edwards, who coordinated a panel on  
22 State Perspective on Land Use Controls.

23 Mr. Edwards?

24 MR. EDWARDS: Thank you, Shah.

25 Madam Chair, members, my name is

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1 Thomas Edwards. I'm an assistant attorney  
2 general from the State of Texas. With me is

3 Dan Miller, First Assistant Attorney General  
4 from the Colorado Department of Law; and  
5 Brian Hembacher, Deputy Attorney General for  
6 the State of California.

7 I was asked to put together a presentation  
8 on state experience with institutional  
9 controls. I call this a work in progress,  
10 because it does not exactly fulfill the  
11 assignment that DERTF gave us. DERTF asked for  
12 a survey of the law of 50 states and to do a  
13 joint study with the ASTSWMO and ICMA. We  
14 simply were not able to do that in the time  
15 allowed -- and, so, I went ahead and did a  
16 survey of selected states that I knew were the  
17 most involved in this -- in this process. I  
18 sent a detailed survey to about 20 states who  
19 have been most active in these issues.

20 Next slide, please. We got responses from  
21 seven states. One state requested that its  
22 answers be kept confidential and, therefore,  
23 that data is included in the statistics only,  
24 but the individual responses are not shown.  
25 Now, you should have before you a paper copy of

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1 these slides -- and the notes at the bottom of  
2 each slide contain the verbatim answers from  
3 the states. So, you can look at the references

4 as time permits. I also have the actual  
5 responses here in case any questions come up --  
6 and anybody wants to ask about a particular  
7 state's response, I can look that up. This  
8 slide contains the usual disclaimers. These  
9 are not the official opinions of the individual  
10 attorneys general or NAAG or so forth.

11 Next slide. The respondents to this  
12 survey had quite a bit of experience in  
13 environmental law. They were all assistant  
14 attorneys general in their respective states.  
15 They had about 13 years experience in  
16 environmental law on the average, about half  
17 that much experience in real property law.  
18 This survey, therefore, comes from a different  
19 perspective than the ASTSWMO survey, which you  
20 saw at the previous meeting. These are not  
21 program people. These are lawyers in the -- in  
22 the attorneys general offices.

23 Next slide. We asked a series of  
24 questions about individual institutional  
25 controls. And, so, with your indulgence, I'd

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1 just like to go through these very quickly and  
2 talk about the individual ICs, because  
3 sometimes we lump a lot of things together  
4 under the term "institutional control" and,

5 in fact, they are separate things.

6 First, we asked about deed notices. Deed  
7 notices are simply notices placed in the deed  
8 records. One question that arises is whether  
9 these deed notices can be placed only by  
10 landowners or whether they can be placed by  
11 other parties. The problem is, if you just go  
12 and place some sort of notice on the deed  
13 records affecting somebody's land, that could  
14 be considered a cloud on the title. So, you  
15 really need some legal authority to do that to  
16 protect you from such a claim. Deed notices  
17 contain no enforceable requirements. They  
18 don't tell anybody to do anything. They just  
19 provide notice that contamination exists on a  
20 certain piece of property, let us say.  
21 However, they can have the effect of  
22 controlling land use indirectly because they  
23 might affect the performance of purchasers of  
24 the property or lenders on the property.

25 Next slide. A deed restriction -- more

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1 properly called a restrictive covenant -- is  
2 essentially a promise between the buyer and the  
3 seller concerning the use of real property.  
4 Generally, those promises are contained in the  
5 deeds. And, therefore, the issue arises

6       whether you need a transfer of an interest in  
7       property in order to have an enforceable  
8       promise. In common law it was thought that you  
9       did. And, so, this only becomes effective at  
10      the time of the sale of the property. In many  
11      states, however, either through statutory or  
12      judicial interpretation, that has been  
13      changed -- and, so, in some states, it may be  
14      effective without transfer of a property  
15      interest. Another question that arises is  
16      whether these -- these promises -- these  
17      covenants -- are enforceable by third parties,  
18      for instance, a state agency that wishes to  
19      enforce a certain promise affecting  
20      environmental protection. They may be  
21      enforceable by third parties in some states,  
22      but may not. You have to research the state  
23      law -- and, of course, you know that real  
24      property law is always state law. The  
25      respondents to the survey said that -- although

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1       you'll see further in the survey they use deed  
2       restrictions quite a bit -- they do not have a  
3       lot of experience in court, in the  
4       enforceability of these deed restrictions in  
5       the environmental context.

6               Next slide. We asked about administrative



7 orders. Of course, these are orders by an  
8 administrative agency -- in our case, a state  
9 administrative agency. These parties -- These  
10 orders always name the parties who are required  
11 to do something. The problem is, they  
12 generally do not run with the land. What I  
13 mean by running with the land is being  
14 effective against subsequent purchasers of the  
15 property -- and the reason is, they apply only  
16 to the people named and you don't know who the  
17 subsequent purchaser might be or the purchasers  
18 after that when you write the order. There  
19 also may be other limitations in such orders.  
20 The reason is that administrative agencies are  
21 always created by statute and, therefore, their  
22 powers are always expressed in a statute -- and  
23 if the statute does not give them the power to  
24 do something, they don't have that power.  
25 Next slide. We asked about court

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1 injunctions. These are very similar to  
2 administrative orders. I probably should have  
3 put this slide first, because -- of course,  
4 courts came before administrative agencies.  
5 Like administrative orders, they're effective  
6 against the named parties and generally do not  
7 run with the land. One additional difficulty

8 is that it is difficult to get court orders to  
9 cover technical requirements. The reason very  
10 simply is that judges may be -- may be expert  
11 lawyers and judges, but are very seldom expert  
12 technicians -- technical people acquainted with  
13 environmental requirements. And, so, it's  
14 difficult to get the judge, first of all, to  
15 write an order or to sign off on an order that  
16 somebody else has written. It's sometimes even  
17 more difficult to get a judge to enforce such  
18 an order if he doesn't really understand the  
19 technical requirements that he's being asked to  
20 enforce. However, courts may adopt agency  
21 orders and, sort of, borrow the technical  
22 expertise of the agency by reducing the agency  
23 order to a judgment of the court. Again, the  
24 respondents to the survey said they had had  
25 somewhat limited experience even with the use

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1 of court orders in this context.

2 Next slide. We looked at environmental  
3 easements. Now, these are similar to  
4 right-of-way easements that you might be  
5 familiar with, which would allow one neighbor  
6 to cross over the land of another to get to a  
7 road, for instance, or a pipeline easement,  
8 allowing a pipeline company to lay pipe or a

9 transmission line of some sort. They are -- in  
10 this context, they would constitute a promise  
11 to protect against exposure to hazardous  
12 substances left on the property. Environmental  
13 easements do run with the land. They sort of  
14 attach themselves to the property -- and when  
15 the subsequent buyer purchases the property,  
16 they take it subject to that requirement.  
17 However, there is a limitation on this  
18 principle and that's called privity. They're  
19 effective against parties in privity with one  
20 another -- and "privity" just means the  
21 connection between a buyer and a seller. So,  
22 you have to look through the chain of title --  
23 or if the property has been divided, you may  
24 have to have it split off and have separate  
25 chains of title -- but you have to show privity

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1 between the parties to that promise -- to  
2 that -- to that easement. These may not be  
3 useful, may not be enforceable by the state --  
4 because, again, they are agreements between  
5 parties in privity and the state or the public  
6 may not be in privity with those parties.

7 Some states have adopted the Uniform  
8 Conservation Easement Act -- not all, but  
9 some. However, the effectiveness of this act

10       against residual contamination is not clear.  
11       It's something of a stretch.  If you just read  
12       the language of the Uniform Conservation  
13       Easement Act, it's something of a stretch to  
14       get it to cover hazardous substances.  
15       Therefore, some states are considering the use  
16       of hazardous substance easements.  But, again,  
17       there's not much experience with this and  
18       I think time will tell if the states adopt  
19       these -- make them a part of their real  
20       property law -- and if they are really  
21       effective to do what we're concerned with here.  
22               We looked at zoning.  Zoning is generally  
23       a local issue.  The state has no control of it,  
24       very little involvement in it.  The respondents  
25       to this survey -- all assistant attorneys

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1       general -- were not comfortable with this.  
2       They worried about, possibly, a lack of local  
3       enforcement, about zoning being changed.  
4       Generally speaking, zoning is not used for  
5       environmental protection and so there's very  
6       little experience with it and the respondents  
7       tended to discount it as a means of ensuring  
8       environmental protection.  
9               Land use ordinances:  Just for  
10       completeness, let me say the answers were very

11 similar to the answers for zoning.

12 Building permits: Again, local control,  
13 very similar answers to the answers on zoning.  
14 However, one state had a rather innovative  
15 answer. They used building permits to ensure  
16 protection of remedies -- and that was Utah.  
17 You can see the answer there. Question No. 22  
18 (a) at the bottom -- Utah -- might deserve  
19 looking into.

20 Next -- The next portion of this report  
21 concerns comparative state experiences and it's  
22 a compilation of answers by all the responding  
23 states with respect to all of the institutional  
24 controls. We asked a general question: What  
25 institutional controls are you using or

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1 considering the use of in environmental  
2 remedies? And you see there the light blue --  
3 the greenish-blue color is "yes." You can see  
4 that deed restrictions were most prevalent.  
5 They were used by all seven responding states  
6 with deed notices and administrative orders  
7 following closely behind, followed by court  
8 orders. The other -- at the bottom there --  
9 there were two responses to that. One was  
10 state permits, which I think is really a  
11 variety of administrative order. I'm not sure

12 about that. The other was a proposed registry  
13 of closed sites. I don't think that exists  
14 yet, but that was proposed. And, so, that  
15 might be something worth looking into.

16 Next slide. This slide is a little busy.  
17 Essentially, we were asking: If you have an  
18 institutional control in place, how do you  
19 enforce it? And the responses group themselves  
20 as NOVs, administrative penalties, civil suits  
21 or criminal suits. Civil lawsuits led the  
22 pack. You can see all seven states do use  
23 civil suits to enforce deed restrictions. Six  
24 out of the seven used them to enforce  
25 administrative orders and court orders. That's

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1 the light yellow bars. NOVs were used quite a  
2 bit -- that's the gray -- used to enforce  
3 administrative orders and others.  
4 Administrative penalties: The light blue --  
5 the aqua color -- was used quite a bit.

6 Next slide. Then, we asked: Who has  
7 authority to enforce institutional controls in  
8 your state and is that authority unclear or  
9 uncertain? We compiled a lot of answers onto  
10 this one slide. You can see that on the state  
11 level, administrative orders and court orders  
12 were thought to be the clearest -- to have the

13       clearest authority for enforcement;  
14       administrative orders, of course, by the state  
15       agency; court orders enforced by the agency or  
16       by the court. On the local level, it's pretty  
17       clear that local government could enforce  
18       zoning. When you got into deed restrictions or  
19       deed notices, it was a little bit less clear.  
20       The respondents were not quite as certain about  
21       the ability to enforce those.  
22               Next slide. Then, we asked the specific  
23       question: Are you aware of any limitations on  
24       the legal enforceability of these institutional  
25       controls? And I've got to say, I don't

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1       understand this slide. I don't understand the  
2       answers that we got here. Perhaps the question  
3       was not clear because it was asked in the  
4       negative. Here you see a "no" is sort of good,  
5       if you're out to enforce, and a "yes" is bad.  
6       So -- but -- in any event, I found the answers  
7       rather confusing. For example, I would have  
8       thought that everybody would have said deed  
9       notices are not enforceable at all. They are  
10       totally limited. Yes, there are limitations on  
11       the legal enforceability of deed notices, but  
12       three states said no. "No, there are limits on  
13       the enforceability of deed notices." I don't

14 know what that means. So, I am not able to  
15 draw any conclusions from those answers, except  
16 that possibly the question was not clear.

17 We asked about public access to  
18 information on institutional controls -- and  
19 here the -- the red is bad. Red is  
20 infeasible. That means there's difficulty in  
21 gaining access to the information in those  
22 institutional controls. Now, what we see there  
23 is that administrative orders and court orders  
24 have problems. And if you read the responses,  
25 the problems are that they're indexed by name

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1 of the parties, not by the identity of the  
2 site. And, so, you have a tract of land that  
3 you want to go and find out, "Is there an  
4 administrative order or a court order affecting  
5 the environmental condition of this property,"  
6 you're going to have trouble finding it. On  
7 the other hand, deed notices and deed  
8 restrictions do much better. The reason is  
9 those are indexed in the deed records in your  
10 local county clerk's office and when you go to  
11 buy your land and you have the title  
12 examination done, it will show up on your title  
13 report. And, so, the respondents felt much  
14 better about public access to information on



15 deed notices and deed restrictions.  
16           Next slide. We asked about institutional  
17 controls used together -- the layering  
18 concept -- and here are the responses that we  
19 got -- and I thought they were sort of  
20 expected, but it was very interesting to see  
21 that they're actually being used -- such as,  
22 for instance, administrative orders requiring  
23 deed restrictions or orders requiring deed  
24 recordation. In other words, you get the  
25 advantage of naming the parties in the order

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1 and also filing it in the deed records so it  
2 will show up linked to that tract of land. So,  
3 I'll just let you look at that slide. But  
4 those -- those are the responses.  
5           Next slide. We asked about which  
6 institutional controls are used with  
7 engineering controls and we found that deed  
8 restrictions really lead the pack. They're the  
9 leading institutional controls used to restrict  
10 access to contamination. Six out of the seven  
11 states said, yes, we use them, and the other  
12 state was considering their use.  
13 Administrative orders and court orders were  
14 next, with four states respectively, one  
15 considering and one saying no and one state not

16           answering.

17                   Next slide. Then, we asked: Is the use  
18           of these controls voluntary or involuntary on  
19           the part of the landowners? Now, again, I've  
20           got to confess, I think this was a bad  
21           question. What I was really trying to ask was  
22           this: Is there any way to impose these  
23           institutional controls involuntarily? Because  
24           you would assume that these things could be  
25           done by agreement always. And, so, I'm not

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1           really sure what the respondents were thinking  
2           when they answered this question. But in any  
3           event, with respect to deed restrictions,  
4           for instance, five out of seven said  
5           voluntary. One said both voluntarily and  
6           involuntarily and one said involuntarily. I  
7           think what this means is: There is a pattern  
8           in which the use of institutional controls is  
9           an alternative to regular enforcement to -- I  
10          shouldn't say to a -- a full cleanup -- and,  
11          therefore, it's voluntary in that sense that  
12          you do it by agreement. The Defendant may not  
13          feel that he's a totally free agent there  
14          because he's under the threat of spending a lot  
15          of money on a full cleanup, but I think that's  
16          what this means. The controls are voluntary in

17 the sense that they are an alternative to a  
18 more extensive and more expensive cleanup.  
19 Next slide. We asked a question about  
20 long-term monitoring and enforcement. Are  
21 there problems with -- with long-term  
22 monitoring enforcement or are the provisions  
23 adequate for this enforcement and what agency  
24 is responsible? And we found, sort of, a mixed  
25 bag there. The respondents were, generally,

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1 sort of undetermined about the local means.  
2 They probably didn't know that much about  
3 long-term monitoring and enforcement of -- like  
4 zoning or local land use ordinances -- so  
5 they -- that's pretty much undetermined. On  
6 the state level, administrative orders, court  
7 orders, deed restrictions and so forth, some  
8 thought they were adequate, some were  
9 undetermined, a few thought that there were  
10 problems with long-term monitoring and  
11 enforcement.

12 So, we asked a more specific question  
13 about funding. Is funding adequate to  
14 implement, monitor compliance with and enforce  
15 institutional controls in your state? And,  
16 here, I think -- you really need the color to  
17 capture this data -- and I think it's very

18 interesting. The respondents generally felt  
19 pretty good about funding to implement the  
20 institutional controls. After all, that  
21 shouldn't take much. If we have the program  
22 running now, we're pretty sure that we can do  
23 it within our program. They also felt  
24 reasonably sure -- although many were  
25 undetermined -- but they felt fairly confident

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1 that in the future they would be able to  
2 enforce. If it comes to their attention that  
3 these ICs are being violated or are not  
4 providing the protection that they should, we  
5 think that we can get our program to enforce,  
6 because it will be a human health and  
7 environment threat and, so, we can probably  
8 find the money somewhere to take care of that.  
9 But the long-term monitoring is where we find  
10 the problem. There's a good deal of concern  
11 expressed there, as you can see by the red in  
12 the middle, about the adequacy of funding for  
13 monitoring of institutional controls and I  
14 think that's one of the leading conclusions  
15 that you draw out of this study.

16 We asked about using assumed land use  
17 restrictions as a basis for setting cleanup  
18 levels. For instance, allowing higher levels

19 of residual contamination on industrial  
20 property as opposed to residential property.  
21 Six out of the seven states said, yes, we do  
22 that and we use deed restrictions to do it.  
23 So, there may not be a lot of experience in the  
24 success rate of doing this, but, apparently,  
25 quite a few states are trying it.

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1 Next slide. Conclusions about the  
2 effectiveness of institutional controls in  
3 setting cleanup levels: General response was  
4 inadequate experience in most states to judge  
5 the effectiveness of this process.

6 Next slide. We asked about using  
7 institutional controls -- the difference  
8 between NPL and non-NPL sites. The principle  
9 difference was EPA has to be a party to the  
10 negotiations at NPL sites, as you would  
11 expect. Few other differences.

12 Next: We asked a question about takings  
13 and got the answer -- common sense answer  
14 back. These are not compensable takings  
15 because they're voluntary.

16 Finally, conclusions of the survey: You  
17 have to recognize there's limited data. I need  
18 to be conservative about the conclusions that  
19 can be drawn from this. It's only seven

20 states. However, I think that we saw enough  
21 there to see that there are some problems with  
22 enforceability of institutional controls.  
23 Court and administrative orders do not run with  
24 the land. Deed notices, the restrictions,  
25 easements, require privity. The states are

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1 unsure about the -- about local measures -- and  
2 I think Dan Miller will talk some more about  
3 that -- and, therefore, that leads to the  
4 conclusion that multiple controls are  
5 advisable. The layering concept, which DERTF  
6 has already heard about -- I think that is  
7 reinforced by the results of this study.

8 Finally, I think this study shows a good  
9 deal of concern about long-term monitoring and  
10 DERTF has already identified this as a concern  
11 and I think this survey reinforces that -- and  
12 I guess we will take questions after the other  
13 presentations.

14 Thank you.

15 MR. MILLER: Good afternoon. My name  
16 is Dan Miller. I'm a first assistant attorney  
17 general with the State of Colorado and I'll be  
18 talking about what attributes -- at least in my  
19 opinion -- effective institutional controls  
20 should have and, then, applying that analysis

21 to the different mechanisms that are available  
22 in the State of Colorado that could be used for  
23 institutional controls and drawing some  
24 conclusions there and, then, lastly, discussing  
25 briefly how we're using institutional controls

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1 at military bases in Colorado.

2 And this would not be an exhaustive list  
3 of the attributes of effective institutional  
4 controls, but from a legal perspective, it  
5 seems to me there's two key points. One is it  
6 needs to be legally enforceable. Second, you  
7 have to have some sort of monitoring and  
8 enforcement organization.

9 What makes an institutional control  
10 enforceable? In my perspective, the cleanup  
11 regulator has to be able to enforce the  
12 control. By definition, you're putting in the  
13 institutional control to protect human health  
14 and the environment because of some other  
15 aspect of the remedy -- either you couldn't  
16 clean up all the contamination or you've got  
17 some sort of engineering mechanism in place,  
18 such as a cap that requires protection against  
19 intrusion, through digging or excavation or  
20 some other activity like that. Because the  
21 decision to implement the control in the first

22 place was made by the environmental regulator,  
23 the environmental regulator is the one who  
24 needs to be able to enforce that aspect of the  
25 remedy. It's not to say that other parties

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1 could not also have enforcement authority, but,  
2 at a minimum, the regulators should have it.

3 Secondly, the cleanup regulator should be  
4 the only one that could terminate or modify the  
5 control. It's a corollary to the proceeding  
6 point. Changing an institutional control is  
7 acceptable only if you don't compromise the  
8 protectiveness of the remedy and the  
9 environmental regulator is the only entity that  
10 has the authority, the expertise and the  
11 mandate to evaluate whether a proposed change  
12 in land use would impact the effectiveness --  
13 or would impact the protectiveness of the  
14 remedy.

15 A third element of an enforceable  
16 institutional control is that the available  
17 remedies should include both the ability to  
18 enforce compliance with the control as well as  
19 injunctive relief. For example, you might have  
20 a situation where the institutional control  
21 prohibited residential use, but through a  
22 failure of your monitoring and oversight



23 system, somebody put in a subdivision or some  
24 houses. At that point, it might be a little  
25 bit onerous to tear down all the houses.

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1 Instead, you might look for some other approach  
2 requiring additional cleanup. Maybe bringing  
3 in some new topsoil or venting basements or  
4 whatever the technical solution might be.

5 Other attributes or aspects that make an  
6 institutional control enforceable -- and Thomas  
7 mentioned this point -- it needs to be  
8 enforceability against successive owners --  
9 that's probably the most important element --  
10 as well as anybody who violates the control.  
11 There may be instances where the landowner has  
12 leased the land to somebody else who's taking  
13 some action that violates the institutional  
14 control.

15 Another attribute would be that you have  
16 to make sure that the subsequent owners have  
17 notice of the control. Prevention is the best  
18 medicine here. Obviously, the land record  
19 system that we have in this country would be a  
20 pretty effective means of providing notice to  
21 subsequent owners, although not necessarily to  
22 their lessees.

23 Finally, the controls need to be clear and

24 unambiguous. A restriction that says, "This  
25 land can only be used for commercial or

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1 industrial uses," probably raises more  
2 questions than it answers. How do you define  
3 commercial or industrial uses? Is it with  
4 reference to some state statute? Is it by  
5 reference to the local zoning ordinance? What  
6 if the local government changes the allowable  
7 uses within one of those categories?  
8 Frequently, I think regulators aren't -- may  
9 not even be aware of the scope of activities  
10 that can be allowed within different zoning  
11 categorizations. For example, in Colorado at  
12 the Rocky Mountain Arsenal, some of that land  
13 is going to be transferred to the City of  
14 Commerce City. The land is currently zoned  
15 commercial, although under their zoning code,  
16 commercial uses include day-care facilities.  
17 So -- and this is contaminated land that's  
18 proposed to be transferred. So, probably, in  
19 the institutional control you really need to  
20 be -- you know, typically, they're going to be  
21 used either to limit exposures -- and if that's  
22 the case, you probably need to define very  
23 clearly the assumptions on which the cleanup  
24 levels were based and the assumptions regarding

25 land use exposure that would be acceptable --

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1 or, alternatively, it might be a protective  
2 cap -- and in that case, it might be relatively  
3 easy to draft a control that would clearly  
4 prevent any interference with the cap.

5 The second attribute of an effective  
6 institutional control is that you have an  
7 effective oversight organization. That means  
8 resources. It means people. It means some  
9 funding. The environmental regulator needs to  
10 have the ability to prevent violations before  
11 they occur -- and this is something that's  
12 going to be very different, I think, for most  
13 state agencies. They don't normally have  
14 long-term relationships to regulated entities.  
15 They need to be able to track proposed  
16 rezonings throughout -- and this would be  
17 throughout the state. In a state like  
18 Colorado, we have one central office in Denver  
19 for our environmental regulatory agency and  
20 we're talking about potentially enforcing  
21 institutional controls throughout the entire  
22 state. They need to be able to track issuance  
23 of building permits and they need to be able to  
24 conduct regular site visits -- both because of  
25 the possibility that their ability to track

1       proposed rezonings and issuance of building  
2       permits may be limited -- in fact, probably is  
3       limited -- I'm not aware of any mechanisms for  
4       being able to do that -- particularly to track  
5       issuance of building permits from a central  
6       state location -- but, also, just to go out and  
7       ensure that the control is being complied  
8       with. There may be instances where -- Well, in  
9       our state, you can conduct grading without a  
10      building permit. So, somebody could go out and  
11      grade over a cap and they wouldn't -- wouldn't  
12      have to get any permission from even the local  
13      government.

14             The second attribute, I think, is that you  
15      should have a central registry of the controls  
16      and that that registry -- as Thomas  
17      indicated -- probably ought to be searchable by  
18      the location of the land as opposed to the name  
19      of the party. It should clearly include the  
20      basis for imposing the institutional control so  
21      that five, ten -- twenty years from now,  
22      people -- when somebody wants to come in and  
23      change the land use, it -- the regulators at  
24      that time will be able to look and see, "Why is  
25      this restriction here in the first place? Is

1       it to protect a cap or is it to limit  
2       exposures?  What is" -- "If it's the latter" --  
3       you know, "what is the nature of the remaining  
4       contamination?  Is it something that degrades  
5       with time or" -- "or not?  Is it radionuclides  
6       or heavy metals that probably are going to be  
7       as hazardous 40 years from today as they are  
8       today?"

9               Finally, the oversight organization needs  
10       to have the ability to evaluate any proposed  
11       changes in land use for consistency with the  
12       control.  The -- in our state -- at this  
13       point, we don't have an oversight  
14       organization.  We're not -- We don't have  
15       anybody -- any personnel -- who are dedicated  
16       to overseeing compliance with institutional  
17       controls, but, then, we don't have very many  
18       that are in place yet.

19               Now, I want to evaluate the potential  
20       mechanisms that are available to use as  
21       institutional controls in Colorado from the --  
22       judging -- judging them by the above criteria.  
23       One possibility that people mention a lot is  
24       common-law easements.  It's not clear in our  
25       state if these would be enforceable against

1 subsequent owners of the property and it's not  
2 clear if the regulatory agency would be able to  
3 enforce them. In legal terms, a common-law  
4 easement uses an institutional control as a  
5 negative easement in gross and we just don't  
6 have any case law that says whether that type  
7 of property restriction can be used. In the  
8 common law, there were a lot of limits on a  
9 person's ability to restrain land use or to  
10 restrain the alienability of the land. That's  
11 a long-standing tenet of English and American  
12 common law. And, so, the -- these common-law  
13 approaches -- the easements and the  
14 covenants -- they weren't developed to help us  
15 restrict land use. They were kind of -- for  
16 the opposite reason -- to try to maintain the  
17 free marketability of land. So, we don't know  
18 if we could use common-law easements or not.

19 Statutory easements: That would be a good  
20 approach -- to have a hazardous substance  
21 easement, but we don't have one. We do have a  
22 conservation easement -- a statutory  
23 conservation easement. In looking at the  
24 language of that -- which I believe is the  
25 language of the Uniform Conservation Easement

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1 Act -- it's my opinion that in most instances  
2 it would not be -- you could not use it for an  
3 institutional control. We do have one -- We  
4 have had one case where we probably will be  
5 using a conservation easement where a site --  
6 EPA cleaned up the site totally -- removed all  
7 the contaminants. It was along the edge of a  
8 river and they basically wanted to ensure that  
9 in exchange for having done the cleanup that  
10 the landowner wouldn't just turn around and  
11 build some trophy home on the river -- and, so,  
12 they required a dedication for open space --  
13 but that's kind of an unusual situation.

14 Covenants: Again, this is a common-law  
15 mechanism. Thomas talked about them a little  
16 bit. Once again, with the case law that we  
17 have in our state, it's not clear if they're  
18 enforceable against subsequent owners and it's  
19 not clear if the state would be able to enforce  
20 them. Here, the technical legal jargon has to  
21 do with the privity of the state, which defines  
22 the relationship. In owners of land, it could  
23 be the buyer and seller. It could be the  
24 landlord and tenant. It could be -- you know,  
25 the successors and -- other successors in

1 interest and predecessors in interest. Those  
2 are relationships that the state is not going  
3 to have with the parties with whom it's going  
4 to require institutional controls.

5 In addition, it's possible that there may  
6 be a one-year statute of limitations. There is  
7 a general statute of limitations regarding  
8 enforcement of building restrictions in our  
9 state -- you know, that might be kind of a  
10 difficulty for the oversight agency if they're  
11 trying to enforce these things throughout the  
12 state. One-year statute of limitations is a  
13 pretty short period of time.

14 Zoning is not within the control of the  
15 cleanup regulator. In my opinion, zoning is  
16 not an effective institutional control. Zoning  
17 decisions are made not on the basis of  
18 protection of human health and the environment,  
19 but typically on social and economic factors.

20 The Colorado Hazardous Waste Act: We have  
21 permits and orders that can under certain  
22 circumstances be used as institutional  
23 controls. A permit, I believe, you could  
24 probably require in perpetuity. If you have a  
25 hazardous waste management unit that's closed

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1 in place, requires a post-closure permit, I



2 think we have the authority to require that and  
3 to require successive landowners to maintain  
4 that permit. But there's a lot of situations  
5 involving residual contamination or engineered  
6 structures that you wouldn't necessarily  
7 require a permit -- and there you run into the  
8 question of whether orders run with the land.  
9 We don't have any case law one way or the  
10 other. Certainly, in our consent orders -- we  
11 put statements that say that they -- if the  
12 owner sells the land, that it has to transfer  
13 the -- the order to the new owner, but we  
14 haven't had occasion to enforce any of those  
15 yet.

16 So, I guess, in conclusion, you could say  
17 that in Colorado we have everything we need to  
18 effectively implement institutional controls,  
19 except for institutions and controls. But  
20 we're not in trouble yet. And I think if we  
21 were to adopt a hazardous substance easement,  
22 that would go a long -- and establish a  
23 registry -- that would go a long way toward  
24 solving the problem, but we don't have it yet.

25 Institutional controls at military bases

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1 in Colorado: We don't really have anything in  
2 place yet, unless you count the Rocky Mountain

3       Arsenal Refuge Act, which -- maybe that would  
4       be a very good sort of institutional control.  
5       I remember when the law was passed, personally  
6       thinking that this was an awful idea, that  
7       instead of cleaning up our federal facilities  
8       around the country, we were going to have a  
9       bunch of new wildlife refuges by statute. But  
10      given the difficulty of the other mechanisms  
11      that are available and I think the problems  
12      with tracking them over time, maybe not. There  
13      are some positive aspects of the statutory  
14      scheme, certainly for larger contaminated sites  
15      like Department of Energy facilities. Others  
16      have raised similar comments. The Resources  
17      for the Future, I know, is -- believes that  
18      it's -- certainly for the Department of  
19      Energy -- that maybe a statutory program would  
20      be useful to get the department to pay more  
21      attention to the issue of institutional  
22      controls and being a steward for some of its  
23      sites where we're not going to be able to clean  
24      them up all the way and they are going to pose  
25      hazards in perpetuity.

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1           So, anyway, at the arsenal, we do have the  
2       Refuge Act and the Federal Facility Agreement.  
3       They do set general use limits for the refuge,

4 but there's still a fair amount of wiggle room  
5 in there. The Fish & Wildlife Service does  
6 have the authority to define specific uses.  
7 For example, does open space -- does that  
8 include overnight camping or not? If so, is --  
9 you know, they -- they could restrict that to  
10 certain parts of the arsenal. Or do they  
11 simply let people go around there on the bus  
12 and you can't get out of the bus? Those  
13 decisions are -- my understanding -- within  
14 the scope of Fish & Wildlife's authority to  
15 make. The Refuge Act does require a deed  
16 restriction for the "Western Tier" land that  
17 will be transferred to Commerce City. I  
18 mentioned that earlier. Again, there's some  
19 question as to whether deed restrictions under  
20 our current common-law mechanisms would really  
21 be enforceable or not.

22 The Lowry Air Force Base: Most of the --  
23 this is a BRAC site. Most of the cleanup that  
24 we've done to date has been to unrestricted use  
25 levels. So, we haven't had to worry about

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1 institutional controls. There is an old  
2 landfill that is likely going to become a golf  
3 course. So, it's going to have some kind of  
4 special cap there for all the water that's

5 going to be spread on it. That will require  
6 institutional controls. Again, those are not  
7 in place at this time.

8 And that's it -- except I would like to  
9 make one last comment. All of my discussion so  
10 far has really been focused on land use  
11 restrictions. We are looking at the question  
12 of, "How do you restrict groundwater use?"  
13 And, in my opinion, I think that's probably a  
14 much more complex issue, particularly when you  
15 consider that a neighboring landowner --  
16 I mean, if you have a groundwater plume that's  
17 underneath the polluter's land and does not  
18 extend across the polluter's boundary, the  
19 neighbor might want to be pumping groundwater  
20 and they're pumping their own groundwater,  
21 which they have a constitutional right to do in  
22 our state -- could affect the groundwater  
23 hydrology and cause the plume to migrate onto  
24 their land and -- so, there's a lot of,  
25 I think, unanswered questions with respect to

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1 groundwater controls.

2 MR. HEMBACHER: Hello. I am  
3 Brian Hembacher. I'm a deputy attorney general  
4 for the State of California in the environment  
5 section.

6           First, I wanted to make it clear that  
7           we've had -- as you-all know, an election in  
8           November. It's changed both the governor and  
9           the attorney general of the states and many of  
10          my comments are really going to be based on  
11          past experience. We really don't know yet what  
12          the policy of the new governor will be and how  
13          that will trickle down to the enforcement  
14          agencies nor do we know what the position will  
15          be of the general attorney on a lot of these  
16          issues. So, it's -- I just want to use that  
17          caveat to begin with.

18                 I want to focus on California -- because I  
19                 think California probably has more experience  
20                 than most states, if not all states, and -- in  
21                 terms of dealing with negotiations with the  
22                 DoD -- and closing DoD facilities,  
23                 specifically -- but I also think that  
24                 California has more enforcement mechanisms than  
25                 most other states and I wanted to run through

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1           those a little bit with you first.

2                 First of all, in California -- especially  
3                 through the Department of Toxic Substances  
4                 Control -- has the ability to enter into  
5                 agreements or unilaterally create deed  
6                 restrictions, easements and covenants that are

7 necessary to protect the public or the  
8 environment. Specifically, Health & Safety  
9 Code Section 25202.5 allows the department to  
10 impose easements or restrictive covenants on  
11 hazardous waste facilities -- and that has a  
12 very broad definition in California. It's not  
13 just a facility that has an interim status  
14 document or a permit. It's any place where  
15 hazardous waste has been disposed, which as you  
16 can -- and I should say treated and stored, as  
17 well -- but usually the controversy centers  
18 around hazardous waste having been disposed.  
19 That's a very broad definition and would apply  
20 to most of the circumstances where cleanup  
21 would be required. Health & Safety Code  
22 Section 2522 picks up anything that might be  
23 left over -- because that allows the Department  
24 of Toxic Substances Control -- after an  
25 administrative hearing -- to designate a

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1 property either as a hazardous waste property  
2 or a border zone property. A border zone  
3 property is a property within 2,000 feet of a  
4 hazardous waste property. And having done so,  
5 the department can impose deed restrictions,  
6 restrictive covenants, easements and other  
7 limitations on any property that's contaminated

8 by hazardous waste under that section -- and  
9 that, by the way, is in the Hazardous Waste  
10 Control Law of the State of California -- which  
11 is our RCRA equivalent and would certainly, in  
12 our opinion, be covered under the Federal  
13 Facilities Compliance Act in terms of its  
14 application to federal facilities and DoD  
15 facilities, in particular.

16 And, finally -- the final piece of the  
17 puzzle is Civil Code Section 1471 which allows  
18 those covenants to run with the land -- and you  
19 probably heard the earlier speakers talk about  
20 the problems of privity and so forth. Those  
21 problems do not exist in California because we  
22 do have a specific civil code section that  
23 allows the covenant to run with the land as  
24 long as it's properly recorded and certain  
25 other procedural requirements are followed.

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1 Now, I wanted to focus a little bit on  
2 the -- some controversial issues -- because, so  
3 far, we've sort of heard what people may or may  
4 not be able to do. There has been somewhat of  
5 a conflict, as you-all know, between states and  
6 Department of Defense facilities -- and this  
7 specifically has come up in the area of  
8 institutional controls. I don't know if you

9 know the old joke about how they hunt for  
10 monkeys in India. There's the jar that has a  
11 hole just big enough for a monkey to stick its  
12 hand into when it's -- it's, you know -- it  
13 gets its hand as narrow as possible to get it  
14 through the hole -- and, so, what they do is  
15 they put fruit or some other attractive food  
16 the monkey's going to be interested in down in  
17 that jar -- and, of course, the monkey comes  
18 along and sticks its hand down in the jar and  
19 grabs that fruit. Once it's grabbed the fruit,  
20 its hand is no longer as narrow as it needs to  
21 be to pull it out and that monkey just can't  
22 let go of that fruit and, so, ultimately, it's  
23 captured that way. Well, I look a little bit  
24 at DoD facilities like that. They just can't  
25 let go of the concept that they are not

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1 immune. There's not sovereign immunity anymore  
2 in terms of how state hazardous waste control  
3 laws are applied or in terms of CERCLA cleanups  
4 where states have hazardous substance -- like  
5 California used to have -- and, hopefully, will  
6 have again soon. But there is a real battle  
7 for them -- and -- Bernie Schaeffer, who I know  
8 I had some of this discussion with when we were  
9 both involved in the Range Rule Work Group --



10 about just what is the authority, what does DoD  
11 actually admit to, I would say that -- I think  
12 the argument gets down to some DoD people will  
13 say, "Well, you guys may have the authority,  
14 but we're not going to concede and we certainly  
15 reserve the right to make the legal argument  
16 that there is sovereign immunity or that you  
17 guys could grant it particularly." So, in  
18 essence, it's a refusal to concede that the  
19 states actually have authority in this area.  
20 This has not been tested, but it may be an area  
21 where we will have future litigation.

22 But -- like DTSC and the state fund  
23 regional water boards have attempted to work  
24 out -- negotiate on military bases as to  
25 institutional controls. So far this has not

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1 worked that well. There are instances,  
2 certainly, where military bases have approved  
3 institutional controls with subsequent  
4 purchasers and with regional planning agencies  
5 and so forth, but these do not have specific  
6 state enforcement authority. In other words,  
7 those are -- under Civil Code Section 1471 with  
8 the state as a party to that nor were they  
9 negotiated under the Health & Safety Code nor  
10 did, of course, California impose those

11 requirements upon the military agency. Now,  
12 this is in spite of the fact -- if you read  
13 some of the DoD documents, such as guidance  
14 establishing institutional controls at closing  
15 military installations, you will see a  
16 discussion about staff regulatory authority.  
17 But, again, this seems to be something that is  
18 argued about -- especially in the field. I --  
19 I think we get contradictory messages in the  
20 Department of Defense. I think sometimes we  
21 hear one thing -- and, then, actually at the  
22 field level, we'll hear an entirely different  
23 matter as to how state authority -- regulatory  
24 authority is perceived. Now, this is a key  
25 point -- the difference between the local

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1 planning agencies for local government and  
2 state government -- because I think you heard  
3 Dan, in particular, speaking to the problem of,  
4 "Who's going to monitor these things in the  
5 future?" And very few local governments are  
6 set up to do that. It looks like some state  
7 agencies haven't really thought a lot about it,  
8 either. Certainly, state agencies have the  
9 people, the expertise and probably are more  
10 likely to have the ability in the future to  
11 enforce them -- and they have the enforcement

12 arm -- the mechanisms -- through the  
13 statute -- and, then, to my office -- the  
14 attorney general's office by referral -- having  
15 the ability to enforce these down road whereas  
16 there's some questionable authority as to the  
17 local governments.

18 There have been some exceptions. I don't  
19 mean to paint all DoD facilities the same way.  
20 There has been some attempt to negotiate  
21 institutional controls in a couple of  
22 instances. In fact, one instance that's been  
23 certainly novel -- a twist on it -- whereas  
24 the -- and this is just in -- in the  
25 discussion phase -- but there's been one

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1 discussion about making the military facility  
2 in this instance and the department and the  
3 regional -- the covenantee -- and that the land  
4 use agency or the subsequent purchaser would be  
5 the covenantor to a -- a restricted covenant.  
6 That's kind of turning it around in a -- this  
7 was just mentioned to me last week, so I  
8 haven't thought of all the implications of  
9 that -- but the one problem, as I understand,  
10 with that -- that particular suggestion is that  
11 it still would not allow the department to  
12 determine what that covenant would actually

13 say. That would be determined purely through  
14 the negotiations between the military facility  
15 and the local government authority so that DTSC  
16 is sort of left out -- and, so, they'd have the  
17 ability to enforce this, but not the ability to  
18 actually say what the covenant should be.

19 This is, of course -- this institutional  
20 control issue that I've been talking about is  
21 part of a larger issue. As I mentioned before,  
22 you have this battle between -- I was involved  
23 in a group -- a lead regulator work group --  
24 which a lot of federal facilities do not want  
25 to be -- and this is not just Department of

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1 Defense -- it's Department of Energy and some  
2 other facilities, as well -- don't want to have  
3 two regulators that say -- they don't want EPA  
4 and the state or DoD and the state to be  
5 involved in determining how-clean-is-clean kind  
6 of issue. After being on this work group for  
7 almost a year, it became very clear to me that  
8 they wanted to have one regulator and it was  
9 clear that that -- the whole government was  
10 going to be that one regulator. The purpose of  
11 this work group was to encourage states not to  
12 be the lead regulator. Most states -- Well, at  
13 least the states that have sufficient resources

14 to have programs -- I don't think are going to  
15 accept that -- and, certainly, California is  
16 not going to accept that. So, I think that the  
17 problem we talked about in terms of  
18 institutional controls is part of that larger  
19 battle and is yet to be resolved.

20 I think one of the -- the arguments that  
21 we often get in, is -- is to how far does  
22 U.S. -- Colorado extend -- and certainly an  
23 argument we've had with legal representatives  
24 of the Department of Defense and other federal  
25 facilities is the fact that that's a

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1 Tenth Circuit case -- the laws and tests in  
2 this area. But I can guarantee you that most  
3 states are going to continue to assert that  
4 they have authority in these areas and that  
5 they are not preempted by federal law -- and,  
6 certainly, California is one of those states.

7 Now, some issues that have come up in the  
8 future in regards to institutional controls  
9 and -- and talking to programs -- staff --  
10 and -- and have yet, really -- there are,  
11 really, I think no solutions to these  
12 problems -- are such problems of, "Who will  
13 make the institutional controls known? Who has  
14 that job of actually going out" -- not

15 necessarily today or tomorrow -- ten years from  
16 now, 20 years from now -- "Who is going to fund  
17 that? Is that subsequent purchaser" -- "that  
18 land use agency going to have that  
19 responsibility? What's the likelihood of that  
20 occurring? Who will fund this monitoring and  
21 review down the road? Does local government  
22 have the resources and expertise to follow up?  
23 If the successor/owner violates restrictions,  
24 is there a remedy failure under CERCLA?" Has  
25 that question been answered in the agreement,

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1 for instance? "Will DoD maintain a registry of  
2 transferred properties that have restrictions  
3 so that they can be tracked by DoD or others or  
4 will that response be entirely upon the local  
5 government agency? What role will state  
6 regulatory authorities have in modification or  
7 termination of these restrictive covenants or  
8 deed restrictions in the future?" That -- That  
9 question has not been answered at a lot of  
10 sites. "And how will the state gain access to  
11 the site for monitoring purposes?" Arguably,  
12 under the hazardous waste control law, the  
13 state may be able to make an argument that this  
14 isn't a hazardous waste facility because  
15 hazardous waste hasn't been disposed there, but

16       that's a tough -- tough argument to make and  
17       it's certainly not one that we want -- would  
18       want to have to make.

19               So, in closing, I would just submit that  
20       push hasn't come to shove yet. The federal  
21       government and state governments -- at least  
22       not the State of California -- have not squared  
23       off to fight this battle out as to who really  
24       has -- or not really who has -- but how many  
25       people have the right to regulate these closing

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1       bases -- and if I could just share with you --  
2       recently, we saw a letter had come back from  
3       one of the branches of the armed services --  
4       referred to the state asking for institutional  
5       controls as another unnecessary layer of  
6       government regulation. Well, that's the kind  
7       problem I think we're talking about. There's a  
8       perception, again, that the state is an  
9       unnecessary third party, if you will, to  
10       this -- to making sure that the institutional  
11       controls are carried forward into the future --  
12       and I would submit that DoD is not going to be  
13       there, the local government's not going to be  
14       there and the state agencies are probably best  
15       situated to really carry them forward and make  
16       sure that there's monitoring, oversight and

17 knowledge -- education of people into the  
18 future.

19 Thanks.

20 MS. PERRI: Okay. Thank you. I  
21 appreciate everyone's presentation.

22 Thomas, I guess you're going to continue  
23 to work on yours. Obviously, as you stated,  
24 seven states is the tip of the iceberg and I  
25 think you need a little more time.

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1 MR. EDWARDS: Well, that's what I  
2 wanted to talk about. I -- Candidly, I -- I  
3 don't know that it would serve much purpose to  
4 send the same survey to all 50 states. We  
5 focused on the -- the ones that we thought were  
6 most likely to respond or most actively -- to  
7 work with the NAAG work group. Perhaps the  
8 best thing to do next is to have a more focused  
9 survey and focus in on some of the particular  
10 areas -- and I was going to take back comments  
11 from the DERTF and think about that.

12 MS. PERRI: Okay.

13 MR. EDWARDS: Also, we can go back  
14 and revisit the question of a joint study with  
15 ASTSWMO, with the -- with your folks over at  
16 ICMA and there's -- the new management at NAAG,  
17 also -- talk to Bob Kenning (phonetic), the new



18 environmental director there. That's another  
19 possibility. So, I would like to hear any  
20 feedback that you have and get direction from  
21 you as to what we can do next.

22 MS. PERRI: Yeah. I think the team  
23 approach is probably one we should explore  
24 separately. I -- I agree there is some new  
25 leadership at NAAG and we should approach them

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1 and see how we might work on something  
2 together, but -- but I thought -- I thought  
3 everyone's presentation was helpful and it  
4 seems to me this issue of long-term  
5 monitoring -- who's going to go physically  
6 check and what's going to happen is -- is going  
7 to be something that we will not resolve --  
8 I mean, there's a broader question. It's not  
9 just for the BRAC sites. It's for all of our  
10 military sites and -- and for many, probably,  
11 NPL sites out there that we need to come up  
12 with a national policy on institutional  
13 controls.

14 But I'm going to start with Brian --

15 MR. POLLY: Thank you very much,  
16 gentlemen.

17 I'm one of the big believers in trying to  
18 gather as much data as possible and I think

19        what Thomas said is very true.  It's -- It's  
20        been a rough ordeal for him trying to figure  
21        out how best to attack this.  I'm going to have  
22        to disagree for the -- on the record that I  
23        feel local communities can and are doing a lot  
24        more on institutional controls the more and  
25        more we look into it.  We have some specific

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1        examples of that that we could go through on  
2        non-BRAC, but that can be for another time.

3            I think what we need to do is -- really,  
4        what Thomas has suggested is probably the best  
5        approach -- is to see if we can more narrowly  
6        define the type of questions that we want to  
7        ask 50 states and what I'd like to recommend  
8        is -- if the Service reps will work with us,  
9        mainly GSA -- what I'd like to do is make sure  
10       Army of Corps of Engineers, the real estate  
11       people, Navy, the Air Force and GSA -- from the  
12       real estate side of the house -- have an  
13       opportunity to work with you, Thomas, to  
14       formulate the types of questions that we want  
15       to ask.  Because, basically, what I -- and,  
16       then, the second thing I want to do is -- once  
17       we get this defined -- is try and figure out a  
18       mechanism so we can keep gathering information  
19       on a routine basis.  So, as things change,

20 based on -- and the one thing you point out  
21 throughout this -- is we still don't have  
22 enough information -- because we're just  
23 starting to deal with institutional controls  
24 and environmental issues -- and as we get more  
25 knowledge and information, we want to have a

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1 data bank available so we within the federal  
2 government on a real estate side as well as an  
3 environmental side are more aware of what the  
4 possibilities are -- and this really ties back  
5 to knowledge management. The more we can know  
6 and understand, the better off we're going to  
7 be in the long-run to work with the states and  
8 local governments to figure out a way that  
9 we're going to be able to solve mutual  
10 problems.

11 MS. PERRI: Okay. Thank you.

12 Stan?

13 MR. PHILLIPPE: I think I've got a  
14 question, but I'm going to wait until I hear  
15 Pat talk and -- and get the DoD approach --  
16 because I think my question is more directed  
17 towards Pat.

18 MS. PERRI: Okay. Paul?

19 MR. REIMER: Thomas, I do predict a  
20 long and fruitful future for you to -- because

21 of your colorful slides -- to produce signs to  
22 guard against intrusion in other states. I  
23 think if you showed somebody something like  
24 this and said, "Hey, if you go in here, you've  
25 got this percent chance of that" -- no --

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1 that's very effective -- very effective.  
2 I wondered, though -- it seems to me that  
3 a conclusion that you've arrived at -- and  
4 maybe it's only because the three of you  
5 represent the state attorney's offices -- and  
6 Brian has brought up the point that -- and you  
7 acknowledge there are other players in the  
8 game -- but I -- I have reached the conclusion  
9 from what you said that you three have come to  
10 the conclusion that the state is the right  
11 enforcer of institutional controls?

12 MR. EDWARDS: Well, that reflects the  
13 response from the people answering the  
14 survey -- and keep in mind, they're all  
15 assistant attorneys general. I accept Brian's  
16 point that the localities may be doing a lot in  
17 this area. We don't necessarily know what it  
18 is. But -- But as Dan pointed out, it's --  
19 it's very desirable to have the person with the  
20 technical expertise -- the one who wants to  
21 impose the control -- be the one actually in

22 charge of enforcing it. So, that argues in  
23 favor of having the state -- having enforcement  
24 at the state level and not at the local level.

25 MR. REIMER: Well, I -- again --

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1 I mean, if -- if -- the only thing I'm trying  
2 to get to here -- just to make sure we've  
3 understood this -- would you put a slide, then,  
4 that would give me the probable chance of this  
5 being overturned if we talked to a bunch of  
6 city attorneys or to -- or to some -- or to  
7 public interest groups? Again, I'm -- it would  
8 be nice if we reached your conclusion and,  
9 therefore, concentrated on the states being,  
10 in fact, the enforcer or the long-term --

11 MR. EDWARDS: No. I -- I think I'm  
12 in favor of -- of Karla's point -- that we need  
13 to do a joint study. See, we started out last  
14 fall, frankly, to do a joint study with ICMA  
15 and ASTSWMO in May. We simply didn't have time  
16 to get it done. And, so, that's why I went  
17 ahead and did this survey. But, no, I -- I  
18 think a joint study including ICMA would be  
19 desirable.

20 MS. PERRI: Because I think what  
21 you're saying is we probably --

22 MR. REIMER: Thank you.

23 MS. PERRI: -- can't draw the  
24 conclusion that you're trying to draw on this  
25 limited information. Is that correct?

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1 MR. EDWARDS: Yes. I -- I would not  
2 conclude that the states and localities are  
3 doing nothing in this area. I'm just  
4 concluding that my survey respondents didn't --  
5 didn't know and were not able to respond  
6 accordingly.

7 MR. HEMBACHER: And I -- I certainly  
8 didn't mean to indicate that the local  
9 government would be excluded. That's not the  
10 intent of my remarks. Local government in some  
11 instances have the authority that the state has  
12 because the state -- the department  
13 specifically has a very good statutory  
14 authority about imposing restrictive covenants  
15 that local government just does not have. They  
16 also have more resources. But I'm sure there  
17 are local agencies and local governments that  
18 can handle it and -- you know, we have several  
19 large cities in this state and I'm sure there  
20 are -- a number of them can probably handle it,  
21 like they've handled other parts of hazardous  
22 waste laws. So, no, it shouldn't -- I didn't  
23 mean to indicate that it should be exclusive in

24 any way.

25 MS. PERRI: Dan?

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1 MR. MILLER: I -- I -- Well, the  
2 opinions I expressed were my own. My opinion  
3 is that the environmental regulator is the only  
4 one who should be able to terminate or modify  
5 an institutional control if it was needed as  
6 part of an environmental regulatory decision.  
7 I mean, I don't see how you can get away from  
8 that.

9 I'm not suggesting that local governments  
10 don't have an important role to play in  
11 determining land use. But because a local  
12 government wants to come along and redevelop a  
13 particular area where there's still residual  
14 contamination or -- where there's an  
15 engineering control in place to protect people  
16 from contamination -- those decisions should be  
17 made on the basis of public health and  
18 environmental concerns, not on the basis of  
19 economic or social concerns, which is typically  
20 the province of zoning decisions. So --  
21 I mean, if they want to -- if the local  
22 government wants to come along and redevelop an  
23 area, that's fine. They should, then, apply to  
24 the state regulatory agency to figure out --

25           you know, "Is the proposed use compatible with

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1           the environmental contamination that remains  
2           there and the engineering controls that  
3           remain?" "If not, what can we do to ensure  
4           that the proposed new development is going to  
5           be protective of" -- of the users?" And, so,  
6           the environmental regulatory agency at that  
7           point would have -- should be able to alter its  
8           decision to impose some different restriction  
9           or -- or require additional land or whatever to  
10          allow a proposed change there.

11                   MS. PERRI: Okay. Thank you.  
12          General?

13                   GEN. HUNTER: Some interesting  
14          perspectives on institutional controls -- and,  
15          of course, my colleagues made the comment about  
16          the statistical sampling of the survey, Thomas,  
17          of -- you sort of dismissed -- not all of it,  
18          but some of it.

19                   I've sat here for the last day and a half  
20          and I've listened to three concepts among many  
21          that continues to pop out. One is  
22          accountability. The second one is  
23          institutional controls and the third is  
24          long-term monitoring and they -- they kind of  
25          stand out -- because I've -- I've heard them in



1       a number of forums. I guess my -- my question  
2       is: Where do they fall in this whole process  
3       in the transfer of properties -- for example,  
4       through the BRAC process? Do we wait until we  
5       get downstream and then start talking about  
6       those kinds of follow-on actions? We're  
7       talking about long-term monitoring. It seems  
8       to me -- in the environmental business plan or  
9       some planning effort up front -- you've got to  
10      put those sticky issues up front and try to  
11      adjudicate those as you go downstream. Because  
12      if you wait until the end, it's almost where we  
13      start -- and in forums I've been in -- that's  
14      kind of -- somebody comes to the table late.

15             We heard from the Native Americans today  
16      and -- you know, potentially, if they take over  
17      properties, they may say, "We'll do the  
18      long-term monitoring," and, then, you get into  
19      a sovereignty piece of the state. So -- that's  
20      just kind of my -- my concern here is where do  
21      we put it in this planning process?

22             MR. EDWARDS: Well, I -- I agree  
23      DERTF has been looking at this and I think  
24      DERTF is probably in the lead among task forces  
25      and institutions that have been looking at this

1 over the past year -- 18 months -- you know,  
2 if you look at our minutes from past meetings.  
3 But we are in an area that is -- that is  
4 developing. There is an awful lot of law --  
5 as -- as my colleagues have pointed out -- on  
6 the books about these. There may be more in  
7 California than other states, but most of  
8 the -- the survey respondents stressed the  
9 point that we do not have a lot of experience  
10 in this area. So -- and, yet, the BRAC program  
11 is at the point of being ready to move into  
12 this -- and I -- I think this is sort of a  
13 critical area for DERTF to look at -- and I --  
14 I accept your point completely. I think --

15 GEN. HUNTER: Well, I was thinking of  
16 this in terms of our presentation this morning  
17 about land use with the voluntary cleanup  
18 program in Pennsylvania. I think one of the  
19 members asked kind of that question. "How do  
20 you enforce it? How do you" -- "How do you  
21 follow up" --

22 MR. EDWARDS: And the answer --

23 GEN. HUNTER: -- "down to local  
24 level?"

25 MR. EDWARDS: And the answer was, in

1        Pennsylvania they have reopeners on their  
2        releases. So, they're -- they're looking at  
3        this, also. I don't know that they have any  
4        special solutions in -- in Pennsylvania that --  
5        that help them avoid these same problems --  
6        you know, the long-term monitoring problem and  
7        how that's to be funded, who's going to do it  
8        and all those things.

9                GEN. HUNTER: Okay. Thanks.

10              MS. PERRI: Jim?

11              MR. WOOLFORD: I would like to thank  
12        the panel and offer a suggestion to Thomas.  
13        This -- this one -- that the Office of  
14        Emergency Remedial Response at EPA is working  
15        on a study with the Environmental Law Institute  
16        on institutional controls -- more of a case  
17        study -- and I'd be happy to work with you to  
18        hook up with that office -- and perhaps there's  
19        something that can be gleaned from those and  
20        if -- next time we meet -- whenever that  
21        is -- just so -- you may be at a point -- you  
22        might be able to report out to the Task Force.

23              The question, though -- and this also may  
24        go to Steve, as well -- is -- is using a CERCLA  
25        ROD as an enforcement mechanism and as a new

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1 sort of -- no one really addressed that issue  
2 through their slides. Do you see that as an  
3 effective means to ensure the protectiveness of  
4 a remedy? And, Steve, if you know, are there  
5 any instances where we ever have done that?

6 MR. ROGERS: First of all, I'm not --  
7 I'm not aware of any time that we've had a use  
8 restriction violation that's ever been enforced  
9 in terms of cleanup -- after the cleanup --  
10 after issuance of the ROD. Although I --  
11 I -- it's interesting -- I'd like to hear the  
12 answer, too -- because that's one mechanism  
13 among the many we've talked about that's --  
14 that's out there.

15 MR. MILLER: I think a CERCLA ROD  
16 would -- falls in the same category as the  
17 state administrative worker or corporate --  
18 you know, it's entered as a consent decree.  
19 Clearly, it's enforceable against the party to  
20 the -- to the -- or the -- or the decree. But  
21 the question is: What happens when the land is  
22 sold two or three times and, then, the  
23 subsequent landowner violates the restriction?

24 MR. WOOLFORD: Is that a tool, then,  
25 that you -- you think that is available to you

1 to use -- even down the road through three  
2 property transfers -- that ROD still be in  
3 existence?

4 MR. MILLER: I think that there are  
5 questions as to whether they would work just as  
6 there's question to whether an administrative  
7 order issued by a state agency could be  
8 enforced against anyone other than the person  
9 to whom it was issued. I don't think we know  
10 the answer to that question.

11 MS. PERRI: Stan?

12 MR. PHILLIPPE: Just -- Just a  
13 follow-on: Is -- Is it not possible to  
14 construct the ROD language that requires the  
15 responsible party -- whether it's DoD or  
16 someone else -- to establish such a covenant  
17 that runs with the land?

18 MR. MILLER: Right. And we have done  
19 that. Then, you get into the question of -- in  
20 our state, at least -- because we don't have  
21 the statutory hazardous substance easement --  
22 when they draft their common-law easement, can  
23 the state enforce it and does it -- does it run  
24 with the land? We don't -- It -- It might. We  
25 don't know -- because we don't have any case

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1 law from our -- in court that says, "Yes, you

2 can enforce a negative easement in gross or a  
3 covenant in that manner."

4 Let me -- I might discuss one NPL site  
5 that we're working on to establish  
6 institutional controls. We're proposing that  
7 language be included in the consent decree that  
8 would require the PRPs to agree to land use  
9 restrictions and to agree that before they  
10 transfer the land to anybody that they have to  
11 provide the state notice of the intent to  
12 transfer and that we get to sign off on the  
13 transfer documents -- and the transfer  
14 documents would have to include a provision  
15 that the transferee would agree to the land use  
16 restriction. So -- and that's kind of a  
17 jury-rigged approach -- and there may be some  
18 problems enforcing that as well in terms of  
19 monitoring. But absent having clear statutory  
20 authority like California has that says, "Yeah,  
21 here's" -- "here's a mechanism that the state  
22 can have the right to enforce this restriction  
23 against subsequent owners. It doesn't  
24 matter" -- you know, "if they wait one year or  
25 five years after the thing has been" -- "or

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1 100 years after it's been violated." They can  
2 always come in and enforce the restriction --

3           that would be nice to have -- and I think -- in  
4           terms of the onus -- the onus is on the states  
5           to be put in the position of trying to get this  
6           sort of legislation.

7                     MS. PERRI:   Okay.   And Don?

8                     MR. GRAY:   Yes.   Well, I'd like to  
9           echo General Hunter's comments.   It does --  
10          It's -- It seems to me it's quite clear that if  
11          the -- the agency that might be in the best  
12          position to enforce these kinds of  
13          institutional controls may frequently not be  
14          the same agency or even the same level of  
15          government is the -- is the one that can do the  
16          best job -- is in the best position to do the  
17          job -- monitoring long-term -- and -- and  
18          and overseeing -- you know, compliance.   So,  
19          what it suggests to me is that we do need to  
20          sort of determine who is in the best position  
21          to do a particular task, all of which need to  
22          be done -- as the General pointed out -- and my  
23          recollection is that the DERTF passed a  
24          recommendation several years ago that said that  
25          as a part of the Record of Decision and drawing

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1           up the transfer documents, the question should  
2           be answered about who is going to have the  
3           responsibility for monitoring and enforcing and

4       where -- and I'd asked for a demonstration --  
5       where the resources to do that are going to  
6       come from? And I still think that's what needs  
7       to be done if we're going to make this work. I  
8       invite any response to that.

9               MR. HEMBACHER: I think your point is  
10       particularly well taken about local government  
11       often -- the agency that will be dealing with  
12       the transfer and -- and making those  
13       arrangements and overseeing the use of that  
14       land -- in other words, what developments take  
15       place -- it's often not to say the county  
16       health agency which might have the expertise to  
17       actually enforce the restrictive covenant. So,  
18       I think that's a very good point you've made.  
19       That is one of the problems with local  
20       government enforcing.

21              MR. EDWARDS: I agree. I might go  
22       back to Jim's question about RODs. There is a  
23       NAAG monograph entitled Institutional Controls  
24       at Closing Military Bases. I think it was  
25       1997. I think it has some statistics in here.

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1       Perhaps you and I can talk about this off line  
2       and -- but if -- there was a study done on that  
3       particular question.

4               MS. PERRI: Okay. We'll go to Steve



5 and, then, the next panel.

6 MR. ROGERS: Okay. Brian, did I  
7 understand -- you said that -- that the state  
8 has in place laws that -- if you basically --  
9 if you do a restrictive covenant in conforming  
10 with those laws, it gives the state the right  
11 to come in and enforce it as well and that  
12 there have been transfers by DoD where they  
13 have refused to follow that process to --

14 MR. HEMBACHER: Where they've not --  
15 Where they've not agreed, to my knowledge --  
16 and this -- various people here from DTSC can  
17 correct me -- I don't believe that the DoD  
18 facilities ever agreed ultimately to a covenant  
19 restriction based on those health and safety  
20 code sections I referred to or the civil code  
21 section I referred to. To my knowledge, there  
22 hasn't been that. There's been plenty of  
23 negotiations about that and requests for that,  
24 but that's never occurred to my knowledge.  
25 Now, it's occurred with local -- the

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1 successor/owner, as I understand, and -- and  
2 the local government sometimes. But to my  
3 knowledge -- and correct me -- Margaret Monier  
4 (phonetic), who's legal counsel for DTSC is  
5 shaking her head "yes." So, I think that's

6 correct. There have not been -- There has not  
7 been a single instance -- although I do know of  
8 two instances, which I certainly made reference  
9 to, where at least it's still being talked  
10 about.

11 MR. ROGERS: And these are transfers  
12 to private parties -- transfers out of  
13 government ownership?

14 MR. HEMBACHER: Right.

15 MR. ROGERS: Okay. That seems pretty  
16 troubling to me from the perspective of -- if  
17 we're trying to do as much as possible to make  
18 these enforceable, I think perhaps we might ask  
19 DoD to look into why was that not -- not going  
20 to comply with -- with -- you know, some  
21 institutional legal problem that prevents the  
22 government from following a process. But when  
23 you transfer property out, you should be doing  
24 as much as possible to make that enforceable.

25 The other question I -- I wanted to ask of

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1 each of you and I'm going to ask this in your  
2 personal capacities because I'm treading into,  
3 sort of, a state's rights area. But if and  
4 when we ever do get some reauthorization --  
5 narrow or comprehensive or otherwise of  
6 CERCLA -- what would be your feeling about

7           trying to build in a federal statutory  
8           enforcement tool that would allow states or  
9           others to enforce these types of institutional  
10          controls in property after it's transferred?

11                 MR. EDWARDS:  Like any intrusion by  
12          the federal government, the state real property  
13          law would not work very well.  It would -- It  
14          would be opposed, I think, by every state.  
15          It's just one of those things -- you know,  
16          we -- we've talked about this once before in  
17          the NAAG work group and -- and the answer that  
18          I got back from the work group is no.  State  
19          property law and state law and the -- it would  
20          be politically infeasible, I think, to attempt  
21          to -- to change that to federal law.

22                 MS. PERRI:  Okay.  Thank you very  
23          much.

24                 MR. EDWARDS:  Any others?

25                 MS. PERRI:  Do you have any

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1          closing -- Do you disagree?

2                 MR. ROGERS:  Silence is assent,  
3          I guess.

4                 MR. MILLER:  I guess my crystal ball  
5          isn't quite that clear -- although I could  
6          certainly imagine some states taking that  
7          position that -- that Thomas just

8 articulated -- plus I think that the problem  
9 needs to be dealt with -- not just for the  
10 federal sites, not just for the NPL sites, but  
11 for -- the little bitty sites, I think, are  
12 going to be the biggest problem -- you know,  
13 people aren't going to remember -- more -- more  
14 people are likely to remember 20 or 30 years  
15 from now that there's plutonium in the soil at  
16 Rocky Flats than they are to remember that  
17 there's some elevated levels of lead or cambium  
18 or something at a former battery recycler  
19 somewhere near the Flat River that has since  
20 been five different businesses.

21 MR. REIMER: Could I add one thing  
22 just based on -- on Thomas' remark? Then, is  
23 it possible in the interpretation that the --  
24 the conflict -- or the basis of coming together  
25 is over real estate law, have you left one

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1 other potential enforcer out of the equation?  
2 Is it the possibility that it is real estate  
3 law and, therefore, the real estate commissions  
4 in each state or the commissioner would be an  
5 appropriate enforcer since you're only --  
6 you're talking primarily about zoning and  
7 real estate utilization?

8 MR. EDWARDS: I -- Well, I don't

9 know. I think restrictive covenants, easements  
10 and so forth are -- are common-law requirements  
11 that -- and -- and the real estate  
12 commissioners of the states have nothing to do  
13 with that. They -- The most direct way to  
14 change state law in that area, I think, would  
15 be to try to draft a uniform state law, say,  
16 for a hazardous substance easement and try to  
17 get that adopted by the several states. But  
18 it's really up to the legislatures of the  
19 50 states and the territories and so forth  
20 to -- to do that and there's -- there's -- I  
21 don't think there's any quick and easy way to  
22 do it -- and in -- in response to Steve's  
23 point -- you know, frankly, I -- I went as far  
24 as to draft something once along the lines of  
25 what you're talking about -- and I was told

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1 just forget it -- the states will resist  
2 federal changes to state property law.

3 MS. PERRI: All right. Thank you  
4 very much.

5 Okay. Pat Rivers?

6 MR. CHOUDHURY: The next presentation  
7 is a presentation by Ms. Pat Rivers,  
8 Corps of Engineers, on land use controls.

9 MS. RIVERS: Good afternoon. It's

10 always a little daunting to follow my  
11 colleagues from the Attorney General's offices,  
12 but I hope to present some additional  
13 information about use of land use controls  
14 within DoD -- and I appreciate the comments by  
15 General Hunter and Don Gray for the last panel,  
16 because they gave me a great segue into some of  
17 the information that I'm going to be  
18 providing. I'm also going to try and help to  
19 get us a little bit closer to back on schedule,  
20 so I'm going to go through these pretty  
21 quickly.

22 Next slide, please. No question property  
23 use is regulated. It has been for centuries.  
24 It's part of the real estate and land  
25 development process. One important reason to

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1 restrict the different uses of land is to  
2 protect human health and the environment.

3 Next slide. In my presentation this  
4 afternoon, I'm going to very quickly go through  
5 land use controls in BRAC and the role of land  
6 use controls -- more of an overview --  
7 because the DERTF has certainly discussed these  
8 topics in the past. I'm going to spend the  
9 majority of my time talking about DoD guidance  
10 that's in development -- and, then, I will

11 touch a little bit on service policies,  
12 experiences and maintaining the effectiveness  
13 of land use controls.

14 Again, I've posted a working definition  
15 and the equation at the bottom -- since I still  
16 hark back to my engineering background -- land  
17 use controls are both engineering controls and  
18 institutional controls combined. So, when I  
19 talk about land use controls, I'm trying to be  
20 very inclusive.

21 Next slide. Institutional controls are  
22 recognized in the National Contingency Plan  
23 both in the short-term during a remedial action  
24 process to ensure that the remedy being put  
25 into place is secure and effective and in the

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1 long-term, for example, where you may cap a  
2 landfill to prevent exposure. As many of the  
3 BRAC properties are progressing toward  
4 transfer, all of us have increased our  
5 awareness and consideration about the use of  
6 land use controls and our shared concerns about  
7 their effectiveness.

8 These controls play an essential role in  
9 protecting remedies and safeguarding human  
10 health and the environment by controlling  
11 exposure pathways or eliminating them. There

12 may be cases where feasible or cost effective  
13 remedies for full treatment are not available,  
14 so land use controls may be put into place;  
15 situations where no very aggressive remediation  
16 is needed because the levels are very low, but  
17 there still needs to be a way to identify that  
18 some materials may still be present or may be  
19 incompatible with certain future uses. The key  
20 is really that land use controls must be  
21 properly planned, developed and implemented  
22 into local land use planning mechanisms.

23 And, so, I will introduce the fact that  
24 DoD is developing guidance on land use  
25 controls. The intent is that it would apply to

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1 real property being transferred out of federal  
2 control, so it wouldn't apply to  
3 federal-to-federal or property that is  
4 maintained by DoD -- and this could be through  
5 the BRAC process or regular land disposal  
6 process. The idea is that it would apply after  
7 some decision has been made to restrict land  
8 use because of contaminants being present --  
9 and in the next few slides, I will talk about  
10 how the guidance intends to address before the  
11 property is transferred, during the transfer  
12 process and after it is transferred.



13           The \$64,000 question: DoD plans to make  
14           this guidance available before it goes final  
15           for public comment, so the DERTF will have the  
16           opportunity, the public in general will have  
17           the opportunity, to comment on this guidance.  
18           Let me make that very clear.

19           Next one. General Hunter talked about the  
20           fact that this information really has to be  
21           shared before the property is transferred --  
22           and this section is really to focus on the fact  
23           that what we're bringing together are  
24           environmental real estate processes so that  
25           they work together in partnership -- and, so,

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1           we have to develop a remedy that's consistent  
2           with the proposed reuse and consider how land  
3           use controls are being applied under state  
4           law. We have to provide information about the  
5           land use controls and the condition of the  
6           property and we have to use a process that will  
7           consider state and local control systems,  
8           whether they're present and how they are  
9           properly used.

10           Next one. Pre-transfer: A really  
11           critical time. Again, our policy is to develop  
12           a remedy consistent with proposed reuse  
13           wherever practicable, but stakeholders have to

14 be involved and we must clearly communicate  
15 when land use controls are being considered and  
16 what the reasons are for considering those land  
17 use controls and get feedback.

18 Next slide. Part of that includes good  
19 documentation. Land use controls must be  
20 recorded in the FOST or appropriate documents  
21 and include the information listed on the  
22 slide. The actual deed language will be  
23 developed by our real estate attorneys trying  
24 to make that link between the real estate  
25 process and the environmental control process.

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1 Next slide. In addition to the  
2 communities, state and local agencies must be  
3 involved early. This could be the local  
4 planning agencies, zoning and water boards,  
5 certainly the regulators -- and one of the  
6 thrusts behind the guidance will be to involve  
7 multiple agencies and use a layering strategy.  
8 There needs to be multiple systems of control  
9 and mutually reinforcing controls -- and I'll  
10 talk more about that later. In addition, there  
11 has to be an implementation plan before the  
12 property gets transferred that identifies the  
13 responsibilities of all the parties and those  
14 responsibilities have to be discussed and

15 shared and the resources required to make this  
16 successful identified and established.

17 Next slide. At the time of the  
18 transfer -- again, the information has to be  
19 documented in the transfer document. The  
20 environmental concerns should be included in  
21 the quitclaim deed language, which will then be  
22 recorded -- and, then, the property can be  
23 properly incorporated into established systems  
24 of management and control. We should address  
25 both parcels of land that are restricted for

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1 use and unrestricted for use. Those  
2 distinctions should be clear. If there are  
3 restrictions, they should be described and  
4 categorized clearly, not just -- for example,  
5 for industrial use -- but what kinds of  
6 restrictions might have to be applied or should  
7 be applied to property. We may want to include  
8 information about how a party can find the  
9 administrative record so that the background  
10 and decision-making leading up to the selection  
11 of the remedy can be documented -- that  
12 documentation can be found -- and, potentially,  
13 a federal point of contact, again, for  
14 information sharing and notice.

15 Following transfer of the property, there

16 are a number of land use management tools that  
17 may be available and they need to be explored,  
18 again, prior to the transfer so that  
19 post-transfer you know which ones are in place  
20 and how they're going to be used. There may be  
21 state land use management systems. There may  
22 be notice provided of land use controls to  
23 affected parties, self-certification, permanent  
24 markers. During the five-year review or  
25 operation of the remedial action or during the

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1 operation and maintenance phase of the remedy,  
2 there might be opportunities to establish  
3 particular land use management tools.

4 The DoD authority is going to be limited  
5 once the property is transferred. So, all of  
6 these considerations need to be in place before  
7 that happens. And we have seen -- I think the  
8 panel before me talked about this point -- that  
9 some states are increasing their trend to  
10 establish land use management and enforcement  
11 systems. California's program was discussed.  
12 Connecticut has a relatively rigorous program.  
13 Massachusetts certainly does -- and I'll talk  
14 about Massachusetts in a little bit.

15 Additionally, for Superfund sites that are  
16 fund financed, states have the responsibility

17 to assure that any land use controls are in  
18 place, reliable and will remain in place after  
19 the initiation of operations and maintenance.  
20 So, as I think Dan Miller said, this isn't an  
21 issue that's just important for BRAC properties  
22 or other federal properties, but it does apply  
23 at our Superfund sites and at non-NPL sites so  
24 that all parties understand the mechanisms that  
25 are available and the effectiveness of land use

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1 controls.

2 In the past, we've talked about the  
3 fact -- I think I had one that was titled  
4 DoD Guidance on Land Use Controls  
5 Modification/Termination and Records  
6 Management. Thank you.

7 At certain times as we've talked about in  
8 the past within the DERTF, there is a  
9 requirement to modify or terminate land use  
10 controls. There are appropriate times when  
11 that needs to happen. For example, if the  
12 remedy has achieved the cleanup standards so  
13 the short-term controls are no longer required  
14 or if additional cleanup is conducted on a  
15 property, that means that the restrictions no  
16 longer need to be in place. And, so, our  
17 guidance will talk to how we will assist in

18 terminated or modified land use controls when  
19 appropriate -- and we are also looking at some  
20 options to track the use of land use controls.

21 The military departments are -- have been  
22 at different points in developing guidance.  
23 Army has an interim guidance for BRAC and  
24 active installations which covers how to  
25 document CERCLA decisions using institutional

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1 controls and outlines principles for  
2 institutional control maintenance. Navy and  
3 Air Force have been working on developing  
4 guidance. Those documents -- The information  
5 in the DoD guidance document, obviously, may  
6 influence the development of those policies or  
7 any necessary changes to it.

8 Next one. Okay. I said that I would  
9 touch on the Service's experiences with land  
10 use controls. There are restrictions in many  
11 BRAC property leases, but to date, we have  
12 limited experience with land use controls at  
13 transferred property. So, I am going to talk  
14 to a few examples -- and what I'll do is give  
15 you an example -- the Army Materials Technology  
16 Laboratory -- which is on transferred BRAC  
17 property -- it was part of the '88 BRAC round.  
18 The property was transferred in August of

19 1998. There are a number of land use controls  
20 in place. Army Materials Technology Laboratory  
21 is in Massachusetts. And, so, the state there  
22 has a very aggressive and rigorous land use  
23 control approach. The controls in place are no  
24 residential activities. There are groundwater  
25 restrictions, excavation restrictions under

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1 buildings and in hot spots and there are soil  
2 transportation restrictions. There is a series  
3 of interrelated compliance mechanisms, which  
4 include the Notice of Activity Use Limitations,  
5 a grant of environmental restriction and  
6 easement, a Memorandum of Agreement and deed  
7 restrictions. There's been an arrangement made  
8 for the LRA -- which is that Watertown Arsenal  
9 Development Corporation -- to perform  
10 inspections of the institutional controls. If  
11 the LRA doesn't do the inspections, then the  
12 responsibility falls back to the Army. So, the  
13 Army has to check whether the LRA is doing the  
14 inspections or will have to conduct the  
15 inspections themselves. The Army is  
16 responsible for enforcement of noncompliance  
17 with the institutional controls and the Army  
18 and the Massachusetts DEP jointly hold certain  
19 enforcement rights and related access rights.

20       So, that gives the Army the right of access,  
21       but the state and EP also retains that right  
22       and has not given up any enforcement rights to  
23       address some of the issues that previous  
24       speakers were raising.

25             For property that hasn't yet been

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1       transferred -- the second category -- at NOS  
2       Louisville -- which is in Kentucky -- a BRAC  
3       installation slated for closure has a lease  
4       that requires the lessee and sublessees to  
5       honor the various restrictions on land use and  
6       they have to seek the Navy's permission to  
7       alter those restrictions. And an example at  
8       Mather Air Force Base -- some portions have  
9       been transferred under early transfer  
10       authority. The land use controls there  
11       included groundwater use and soil excavation  
12       restrictions -- and, again, the grantee must  
13       notify the Air Force in advance before  
14       conducting any activities or operations within  
15       the property. In those cases, the property  
16       hasn't yet been transferred so the military  
17       department is still liable for activities if  
18       the lessor violates those elements.

19             Under the category of nonBRAC property, we  
20       do have an example of a land use control that's



21       been in place and successful for a number of  
22       years. The former Kingsbury ordnance work --  
23       and I'm sorry -- I don't have a location --  
24       does anybody know -- was transferred in the  
25       late 1960s for wildlife conservation purposes.

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1       It's been successfully used for that purpose.  
2       There were restrictions recorded in the deed  
3       and the posting of signs was required. So, not  
4       a lot of extensive experience, but some  
5       examples of some different approaches.

6               Finally, maintaining effectiveness of land  
7       use controls: When do you get violations, when  
8       the restriction is unknown to a new party, when  
9       there's a lack of understanding of the  
10      restriction, for example, or if there aren't  
11      any consequences for violating? All three,  
12      important factors. And, so, our guidance seems  
13      to prevent violations by establishing those  
14      mutually-reinforcing controls and appropriate  
15      layering mechanisms before the property is  
16      transferred.

17              At the last DERTF, there were three  
18      locations where examples were raised about  
19      whether or not land use controls are  
20      effective. Alameda was mentioned. There were  
21      no land use controls in place at the air

22 station and there were no known violations.  
23 There were rumors that a utility line marking  
24 was disregarded.  
25 We tried to follow up on Jefferson Proving

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1 Ground. There was a situation where the lessee  
2 deliberately violated a lease restriction.  
3 There was notification to the lessee and there  
4 was clear recording and delineation of the  
5 restricted area, but the lessee planted and  
6 harvested a crop. Okay? So, they knew it --  
7 they went ahead and they planted a crop and  
8 they harvested it. When it was discovered,  
9 enforcement action was taken -- and, so, the  
10 issue was raised by the site manager to  
11 regulators. The state notified the owner and  
12 the lessee destroyed the entire crop. So, part  
13 of what happened in that situation is because  
14 of multiple layering and appropriate  
15 notification action was taken and the crop was  
16 destroyed. So, although there was a violation,  
17 protectiveness was maintained.

18 At Myrtle Beach, there was a lease  
19 restriction that was violated. According to  
20 the Base Environmental Coordinator, an LRA  
21 contractor began digging behind an engine shop  
22 where there was a suspected TCE source. The

23 restricted area was marked in an exhibit to the  
24 lease and the LRA was adequately informed of  
25 the site. In fact, the LRA told the contractor

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1 not to dig in that area. Later in the  
2 afternoon, the LRA discovered that the  
3 contractor had dug in that area. He had  
4 disturbed it by backhoeing. So, the LRA  
5 notified the BEC, the BEC notified the  
6 regulators. Everyone was adequately informed  
7 of the restrictions. The contractor just made  
8 a mistake and the mistake was quickly  
9 corrected. But, again, the fact that there was  
10 notification, that the concern was identified  
11 and captured right away, that all of the  
12 appropriate people were identified and notified  
13 means that the land use control restriction  
14 process, again, was successful in identifying  
15 and preventing activity from continuing on that  
16 might have presented a risk to human health and  
17 the environment. Part of what we are trying to  
18 do or we'll try to do in the guidance is ensure  
19 that the controls will be effective by being  
20 able to catch problems in a timely manner.

21 Finally, there have been few violations of  
22 land use controls, probably because there has  
23 been little experience using them to date. One

24 of the assumptions that gets made is that land  
25 use controls will typically be used where

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1 there's a relatively low level of contamination  
2 still remaining -- and, so, focusing on the  
3 fact that the majority of land use controls are  
4 likely to be used in areas where there's not a  
5 very high risk -- certainly of acute exposure  
6 problems -- rather than using them as a way  
7 to -- as discussed by the previous panel -- as  
8 a way to avoid having to treat the contaminants  
9 at a location. The guidance needs to outline a  
10 comprehensive and systematic approach. We  
11 believe that it will do that. And implementing  
12 the guidance will help us to minimize  
13 violations and ensure timely discovery of any  
14 violations that may occur.

15 Finally, land use controls are often  
16 necessary -- certainly, in the short-term  
17 during the implementation of remedies -- some  
18 in the long-term. They will continue to be  
19 used. Our goal is to optimize implementation,  
20 management and enforcement to reduce the chance  
21 of violations and catch and correct them so  
22 that remedies remain protective of human health  
23 and the environment.

24 That's the end of my prepared remarks.

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1 I thought your presentation was very  
2 informative. You sort of answered some of the  
3 questions that you said that were raised in the  
4 previous panel's discussion. I guess I would  
5 want to specifically know: When do you think  
6 the guidance -- draft guidance -- you don't  
7 want me to ask this -- when would a draft be  
8 available?

9 MS. RIVERS: You're asking me? I'm  
10 going to turn around and say -- I don't know if  
11 you have a schedule right now -- or Shah might  
12 be able to help --

13 MS. PERRI: Do we have a schedule?

14 MR. CHOUDHURY: Right now -- I mean,  
15 the -- as Ms. Rivers pointed out, it is,  
16 you know, in circulation within the  
17 department. I -- at this point, I really can't  
18 say how long it's going to take for us to  
19 arrive at a consensus.

20 MS. PERRI: And how are we going to  
21 make sure that everybody gets an opportunity to  
22 comment? What's going to be our process for  
23 circulation? What do we traditionally do  
24 here?

25 MR. CHOUDHURY: What we're going to

1       do is -- once we have agreed that -- you know,  
2       we all agree that this is fit for prime time,  
3       we will, you know, provide the notice in the  
4       federal registry and post it -- post it on our  
5       web.

6               MS. PERRI: Post it on our web?  
7       All right. So, that's -- that's fine. We --  
8       We would encourage everyone to look for that.  
9       We'll try to do whatever we can to bring it to  
10      others' attention -- and as you all know, we're  
11      going to coordinate with the federal agencies,  
12      as well. So -- Thanks. It's on our web site,  
13      yes.

14             Okay. Don?

15             MR. GRAY: Thank you, Pat. It's a  
16      very good presentation. I'd like to say I'm --  
17      I'm heartened by it -- because I think it  
18      reflects several things that I think most of  
19      the people on the Task Force could agree with,  
20      based on our looking at this issue for such a  
21      long time -- and -- and, specifically, that it  
22      must be a site-specific solution because of the  
23      tremendous variation in state property laws and  
24      whether or not EPA is going to be the  
25      regulatory agency at an NPL site or the state

1       at a non-NPL site -- and -- and, also, the  
2       layering concept which Thomas referred to in  
3       his presentation and -- and you're referring to  
4       it was what I call, "Letting everybody do what  
5       they do best" -- and, thirdly, making these  
6       things very clear and incorporating them into  
7       the transfer documents, the record of decision  
8       and all the other things that -- that go into  
9       making the transfer. So, without commenting on  
10      the -- all the details of if, it certainly  
11      seems to me that it's the right approach so  
12      that we can take the best advantages of  
13      everybody's ability to see that this thing  
14      works.

15                   MS. PERRI: Okay. Great.

16                   MR. GRAY: Thank you.

17                   MS. PERRI: Sure.

18                   Jim?

19                   MR. WOOLFORD: Pat, this is -- I'm  
20      not sure you can answer this question. It may  
21      be more appropriate to John or -- or Paul -- if  
22      he's back there -- and -- you talked about --  
23      NAS Louisville actually raised this question in  
24      my mind. If I recall, that was a site which  
25      was privatized and -- in -- in terms of its

1       operations -- and I think Kelly Air Force Base  
2       is also in the process of being privatized.  
3       Because of that, are -- does that present any  
4       special or unique problems in terms of  
5       establishing land use controls? And I'm not  
6       sure you guys are in a position to answer  
7       that. It just occurred to me when -- because I  
8       remember Louisville being privatized.

9               MS. RIVERS: Again, right now,  
10       it's -- the property is under lease and so we  
11       are still the landholder and using the lease  
12       document as the way to establish the  
13       responsibility and relationship.

14              Paul, I don't know if you want to add --

15              MR. YAROSCHAK: Yeah. Well, just  
16       the -- the real short answer is that it doesn't  
17       establish any necessary -- any particular  
18       problems with regard to institutional  
19       controls. There clearly are -- because of the  
20       privatization -- there clearly are some  
21       particular problems in working through the  
22       actual contract. The lease -- before we turn  
23       over the land and the actual contractual  
24       agreement -- there are some very tricky things  
25       there.

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1 MS. PERRI: Okay. Thomas?

2 MR. EDWARDS: Pat, thanks very  
3 much -- very informative presentation -- and I  
4 will be happy to look at your draft as soon as  
5 it's available and circulate it to the  
6 NAAG/DERTF work group.

7 One, sort of, preliminary comment: I  
8 notice on your slide concerning pre-transfer  
9 documentation of land use controls, you said  
10 that the actual deed language would be drafted  
11 by the real estate professionals. I might  
12 suggest that you pull that back one slide --  
13 back to the slide concerning pre-transfer  
14 consideration of land use controls in the  
15 environmental process. The reason being --  
16 I mean, the way it's -- I don't know if this is  
17 what you meant -- but it sounds like you  
18 decide, first, whether you want the land use  
19 controls, which ones you want and, then, you  
20 tell the real estate professionals to go draft  
21 them. The DERTF recommendation last year was  
22 to bring in the real estate professionals as  
23 early as possible in the process. I think the  
24 lesson that I got out of the survey is we're  
25 not sure about the enforceability of these

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1 things, so you should not assume that they're  
2 all available to you at a particular state.  
3 Get the real estate professionals involved as  
4 early as possible.

5 MS. RIVERS: Absolutely.

6 MS. PERRI: Thank you.

7 General? No? Paul?

8 MR. REIMER: Pat, I had three  
9 thoughts as to how this might evolve as  
10 guidance. I'll start with a question: You  
11 made it clear that in the case of interagency  
12 transfers that the -- the land use restriction  
13 would not be applied. I'm wondering if that's  
14 basically a bad idea, in the sense that after  
15 you have made a transfer, that receiving agency  
16 is going to have less authorship in the  
17 original pollution and, therefore, may find it  
18 very easy to forget about it. Is that a  
19 loophole here where -- why not put it in, in  
20 respect to interagency transfers?

21 MS. RIVERS: I think a better way to  
22 say it is that this guidance document is not  
23 specifically being designed for  
24 federal-to-federal transfers. I think that how  
25 we transfer the property between federal

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1 agencies has to identify the condition of the

2 property and document responsibilities  
3 clearly. I think, in the past, that's been --  
4 my personal sense is we've been more successful  
5 in doing that in a federal-to-federal transfer  
6 and identifying those relationships and  
7 understanding who's responsible for what and  
8 there's less concern on the part of the federal  
9 and state regulators about their roles and  
10 responsibilities in taking action against a  
11 party, if necessary -- if there are violations  
12 or problems. It's a little bit different issue  
13 than the multiple trans -- multiple property  
14 transfer issue that Thomas and his panel talked  
15 about. So, this guidance -- it isn't that we  
16 intend to exclude dealing with land use  
17 controls in a federal-to-federal transfer, but  
18 rather that this guidance is trying to help  
19 particularly focus in on those situations where  
20 the property won't be under federal control in  
21 the future.

22 MR. REIMER: I see. So, in the  
23 former instance, then, the institutionality is  
24 kind of in place?

25 MS. RIVERS: I -- I think that our

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1 recognition is that the relationships are  
2 different because it is another federal agency

3 and so the roles of the regulators are impacted  
4 by that relationship as well.

5 MR. REIMER: It was interesting that  
6 you have a -- in part of the presentation --  
7 dealt with the -- three things, I guess, that  
8 come together -- that -- your anticipation that  
9 this may be used primarily in the case of  
10 low-level forms of contamination, but you also  
11 mentioned that in the case of further cleanup  
12 or as the cleanup remedy in place becomes  
13 effective, you'd almost find a reason to go  
14 back and retest, so to speak -- and I think you  
15 could even add to that -- particularly if you  
16 are anticipating low levels -- then you'll  
17 probably gain a certain amount of natural  
18 attenuation as this goes out in time. Will  
19 there be guidance as to -- kind of an idea  
20 about when retesting or recertification would  
21 be -- would be the right thing to do?

22 MS. RIVERS: I don't know if this --  
23 if we're actually going to describe that  
24 process in detail in this guidance, but  
25 certainly for remedies where treatment is

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1 occurring over time, we would have -- the  
2 period in time when you're actually identifying  
3 that your remedy is complete -- as well as in

4 cases of more significant cleanups -- a  
5 five-year review process for the NPL sites,  
6 for example -- and those are clearly  
7 opportunities to question whether or not  
8 restrictions are still necessary or  
9 appropriate.

10 Paul, I don't -- I think Paul had  
11 something to say about your question earlier.

12 MR. YAROSCHAK: Well, actually, I was  
13 going to -- I think it's really more of an  
14 elaboration on Jim Woolford's question, which  
15 was, "Were there any tricky issues regarding  
16 privatization?" And I kind of thought of one  
17 that's a tricky issue that crosses over both in  
18 privatization and in institutional controls --  
19 and we ran into it at Philadelphia Shipyard --  
20 and that is, where we have, let's say, a  
21 property and we have a deed restriction on it  
22 for -- to remain industrial -- we've cleaned it  
23 up to industrial standards -- it's  
24 industrial -- a privatizer or a new owner  
25 comes in and takes over the property and

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1 decides to excavate and dig some dirt. Now,  
2 left alone, that dirt where it was was just  
3 fine. It was an -- in -- you know,  
4 industrial -- cleaned up to industrial

5 standards. Whose responsibility is it if it,  
6 indeed, now needs some kind of, quote,  
7 "special handling"? It may not be a hazardous  
8 waste, but it requires special handling. In  
9 the case of Philadelphia, we agreed that  
10 that -- that, therefore, was, then, the  
11 responsibility of the new owner. Those are the  
12 kind of tricky issues that need to get worked  
13 out whether you're privatizing, when you're --  
14 either when you're turning over or -- and as  
15 you can see, it's a -- really an institutional  
16 control issue of sorts.

17 MR. REIMER: And last -- if I  
18 may -- so, the -- the issue -- if you're  
19 dealing with environmental pollution in the  
20 classic sense, is that for reasons of  
21 effectiveness of cleanup that's in place, for  
22 natural attenuation, for further cleanup  
23 activity, this -- the -- the situation that  
24 will require the land use control has a -- it  
25 has a sunset date, if you will. It's likely to

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1 be -- to -- to go off the end of the scale.  
2 But what about one other circumstance where  
3 sunsetting is not likely -- and I -- I guess  
4 that brings me to another thought as to  
5 whether -- as you prepare this guidance, would

6           you see it applicable, also, to UXO sites?

7                   MS. RIVERS:  It may well be.

8                   MR. REIMER:  Okay.  Now, there,  
9           you've got a much more permanent situation  
10          to -- to be addressing?

11                   MS. RIVERS:  To use a less -- or to  
12          use a more common situation, if you are capping  
13          a landfill in place, for example, you also  
14          would have a long-term situation -- and that's  
15          why earlier in the presentation I talked about  
16          both short-term application -- short-term is  
17          relative.  It may be during the operation of a  
18          groundwater pump-and-treat system, for example,  
19          so it may be multiple years -- but short-term  
20          compared to the full use of the property over  
21          decades.

22                   MR. REIMER:  Well, my only point,  
23          then, is:  Is it likely that out of this  
24          guidance you'll have any -- any slight  
25          indication of timeliness -- in other words,

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1          that -- if you're going to draft the long-term  
2          commitment, then it may be very valuable to  
3          indicate the range of time that you expect it  
4          to be in place as part of the -- of the  
5          adoption of the land use control?

6                   MS. RIVERS:  Yes.  I think -- in the

7 site-specific agreement, the nature of the  
8 restrictions, as I mentioned, is critical to  
9 define. For example, it may be a restriction  
10 on digging during a certain period of time or  
11 only in a certain area or it may be restriction  
12 of use of the groundwater while the treatment  
13 process is in place and operating, but that  
14 could be changed once the quality -- the  
15 cleanup limits are met -- and, then, during a  
16 five-year review process. For example, if you  
17 demonstrate that your remedy has maintained its  
18 effectiveness, those groundwater use  
19 restrictions may be able to be lifted or  
20 modified. So, there's a possibility of  
21 elimination. There's a possibility of  
22 modification. Both may have different  
23 applications.

24 Paul just reminded me that the  
25 Range Rule -- which is in draft -- is also

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1 focusing on a number of the UXO issues. So,  
2 that's another element in terms of land  
3 management.

4 MS. PERRI: Okay.

5 Steve? Anything? Stan?

6 MR. PHILLIPPE: Just a couple of  
7 things, Pat. One of the snags that we are



8       trying to work through here in California has  
9       to do with the -- the timing, I think, of the  
10       placement of restrictive use covenants and  
11       since -- as my attorneys tell me, restrictive  
12       use covenants can only be applied between  
13       ourselves and the landowner. At a time that  
14       we're doing a ROD on a property, there is no  
15       restrictive use covenant. So, it kind of comes  
16       down to, you know, a promise in the future that  
17       somebody who will become the landowner will  
18       enter into a restrictive use covenant -- and  
19       that -- you know, that's been a problem because  
20       DoD says that while they're the landowner at  
21       the time of the ROD, they don't want to enter  
22       into the restrictive use covenant. Would the  
23       guidance allow the DoD or the military to enter  
24       such covenants with us?

25               MS. RIVERS: I think the philosophy

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1       behind the guidance will be those  
2       mutually-reinforcing controls. And, so, it may  
3       be that at the time of the property transfer,  
4       the transfer document would hold a condition  
5       that the new property owner would be willing to  
6       enter into a restrictive covenant. So, it's --  
7       it's building a series of linkages that make  
8       sense in terms of property law relationships

9           and what each party's rights are in order to  
10          ensure that they have right-of-access,  
11          et cetera. I think, again, the Memorandum of  
12          Agreement between AMTL and the Commonwealth of  
13          Massachusetts talked about how to both have  
14          access to the site and how to share rights to  
15          enforce the terms of different agreements. So,  
16          there are a variety of tools. The emphasis  
17          behind the guidance, I believe, will be to  
18          understand the linkages and how each of those  
19          tools supports or reinforces the others.

20                 MR. PHILLIPPE: So, you're sort of  
21          entering into an agreement -- a binding  
22          agreement -- that at the time the property is  
23          transferred that language would be in there.  
24          So, there is a binding agreement between  
25          ourselves and the military at the time of

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1          remedy selection, for instance?

2                 MS. RIVERS: That might be a  
3          possibility.

4                 MR. PHILLIPPE: I've also seen  
5          some -- some e-mail in the last couple of  
6          months about -- that -- that possibly sounded  
7          like the unilateral imposition of restrictions,  
8          say, under state law in California would  
9          constitute a taking. Is that something that's

10       come up in your discussions around closing  
11       bases? Because I think that was more in tune  
12       with, you know, current government-owned  
13       property at active bases.

14               MS. RIVERS: I think Thomas' point  
15       earlier that if the parties enter into an  
16       agreement to use a land use restriction, then  
17       it can't be a taking because the parties are  
18       willing to do so. I don't know of a situation  
19       where there's a unilateral decision -- and,  
20       certainly, the theme behind this guidance is  
21       that we have to coordinate with the  
22       stakeholders and consider future land use in  
23       our remedy selection. So, that implies a  
24       give-and-take process where the parties are  
25       mutually agreeing.

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1               MR. PHILLIPPE: Yeah. I -- I  
2       certainly agree with you. I just -- it seemed  
3       like that wasn't the conclusion that was going  
4       across the e-mail, though -- that -- that the  
5       military could not give up such rights to  
6       property because it's not theirs to give up.  
7       Maybe this is something even that Brian's  
8       office has some --

9               MS. RIVERS: Well, I would assume  
10       that --

11 MR. YAROSCHAK: Yeah. I think what  
12 you're talking about, Stan, is on active  
13 bases. We are not allowed to issue a deed  
14 restriction, because, indeed, the federal  
15 government owns the land, not the Navy, and GSA  
16 has a policy out on that. However, you are  
17 correct -- and once -- once we transfer the  
18 land, we could enter into some type of  
19 agreement with the regulator on two accounts.  
20 Number one, while we own the land, there's  
21 certain things that we will do to make sure  
22 that the restriction stays short of a deed  
23 restriction. Number two, we could agree that  
24 once we transfer, that that -- that a deed  
25 restriction is, indeed, transferred to the new

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1 owner.

2 MR. PHILLIPPE: Okay. Last comment  
3 is -- just one of the things that you said  
4 in -- in the discussion of the guidance was  
5 that -- you said you -- that the guidance would  
6 say that the deals must consider applicable  
7 state requirements -- I thought you said. Is  
8 "considered" -- What do you really mean there?

9 MS. RIVERS: What I'm talking about  
10 is --

11 MR. PHILLIPPE: Comply with or

12 consider?

13 MS. RIVERS: Well, what I'm talking  
14 about is the fact that -- as Thomas' panel  
15 described -- different states have different  
16 capabilities under their state laws -- and, so,  
17 if we want to -- in working with the state --  
18 like we did in Massachusetts -- there's  
19 information that can be shared and agreements  
20 that can be entered into and, then, the state  
21 has resources available to enforce and to  
22 oversee those restrictions. So, it's a  
23 dovetailing process if the state's resources  
24 are going to be part of what's used to ensure  
25 that these restrictions are successful or that

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1 the land use controls can be inspected or  
2 maintained.

3 MR. PHILLIPPE: Well, will there be  
4 an outright statement that -- that -- in any  
5 case, that the federal government must comply  
6 with applicable state requirements in this  
7 regard?

8 MS. RIVERS: I think that that --  
9 that you'll need to look at the draft and see  
10 what the statements are and how they're made  
11 and see if that's a comment.

12 MR. PHILLIPPE: Well, that's my

13 pre-comment.

14 MR. PERRI: Okay. And let's move on  
15 to Brian, our expert.

16 MR. POLLY: Great presentation. And  
17 I appreciate that Thomas asked the question and  
18 you reconfirmed that the real estate people  
19 will be involved at the very beginning of the  
20 process.

21 MS. RIVERS: Yes.

22 MR. POLLY: Thank you.

23 MS. PERRI: Okay. Thank you very  
24 much, Pat.

25 MS. RIVERS: Thank you.

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1 MS. PERRI: What we're --

2 MR. CHOUDHURY: I would suggest  
3 taking a 15-minute break.

4 MS. PERRI: No. No. We were going  
5 to go through a couple business items and,  
6 then, break at 4:00 o'clock -- and, then, we'll  
7 break from 4:00 to 5:30 as planned and move  
8 into the public comment period at 5:30  
9 tonight.

10 MR. CHOUDHURY: Okay. The first  
11 thing I want to do as a business item --  
12 if -- if the Chair concurs -- is -- yesterday  
13 afternoon, we talked about there being nine

14 open action items. I just want to go through  
15 them quickly just to confirm that those are,  
16 indeed, the action items or whether some of  
17 them need to be modified or closed.

18 The first one is titled EPA Institutional  
19 Controls Reference Manual. It's still an open  
20 action item. This is a manual that EPA is  
21 working on. I believe it's still in the  
22 process of comments being reviewed and I think  
23 we are expecting to see the next version --  
24 maybe the final version -- once it's issued.  
25 Correct?

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1 MR. WOOLFORD: That's correct.

2 MR. CHOUDHURY: Okay. We can move  
3 on.

4 The next action item is Providing  
5 Information on State Laws Regarding  
6 Environmental Cleanup ICs. I believe  
7 Mr. Thomas Edwards' panel covered that and  
8 that's still an open action item.

9 MR. EDWARDS: Madam Chair, I would  
10 ask for a little clarification on that. I  
11 heard from -- from Brian that he wanted me to  
12 work with him and the Services on this.

13 MS. PERRI: Right.

14 MR. EDWARDS: I heard from you,

15 I believe, that you recommended that we --  
16 MS. PERRI: And you heard -- And you  
17 heard from Jim -- an offer to look at what he's  
18 doing. I guess what I recommend is that we --  
19 we all just kind of get together, leave it an  
20 open-ended item and we're going to be working  
21 on it as -- as a group different from the  
22 different sources. So -- So, you're not in the  
23 hot seat to produce a document.  
24 MR. EDWARDS: Okay.  
25 MS. PERRI: Okay?

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1 MR. EDWARDS: Well, I -- I thought I  
2 heard from you that you recommended that we  
3 continue to work with ASTSWMO and ICMA.  
4 MS. PERRI: Right. I'd like to --  
5 MR. EDWARDS: And there was a --  
6 actually, Tim Fields was working on getting us  
7 some funding for a project through --  
8 MR. WOOLFORD: We have to talk more  
9 about that.  
10 MR. EDWARDS: Right.  
11 MR. WOOLFORD: I'm not sure it's  
12 appropriate to do right now.  
13 MS. PERRI: Right.  
14 MR. WOOLFORD: I think we need to  
15 review that.



16 MS. PERRI: But -- But, again, I -- I  
17 don't view you as being in the hot seat for a  
18 document at this point on this issue and we'll  
19 just kind of be fluid about how we're going to  
20 approach it.

21 MR. EDWARDS: Thank you.

22 MS. PERRI: Thank you.

23 MR. GRAY: You haven't figured on  
24 the -- out the penalties for noncompliance,  
25 yet.

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1 MR. CHOUDHURY: Okay. We need to  
2 stop for a few seconds.

3 MS. PERRI: Okay. Five minutes --

4 (Discussion off the record.)

5 MR. CHOUDHURY: That was a reminder  
6 that we all need to speak into the mike and one  
7 at a time.

8 So, the last action item was still a NAAG  
9 lead with support from people, as discussed.

10 The third open action item is, again,  
11 NAAG -- which is to: Provide State Natural  
12 Resource Damages paper. I'm still counting  
13 that as an open action item.

14 MR. EDWARDS: Madam Chair, I might  
15 ask for guidance on that, also. We provided  
16 background information on trustees. I'm not

17       sure exactly how we undertook this project and  
18       exactly what we need to do to get it closed.

19               MS. PERRI:  Let's table it until  
20       later, then.

21               MR. EDWARDS:  Yes, ma'am.

22               MS. PERRI:  No big deal.

23               MR. CHOUDHURY:  Next one is:

24       Research Institutional Controls --

25               MS. PERRI:  Wait a minute.

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1       General Hunter?

2               GEN. HUNTER:  Was there a purpose in  
3       that paper -- I mean, other than just for  
4       information or was there an expected follow-on  
5       action?  I think that's Tom's question.

6               MR. EDWARDS:  Well, General, I think  
7       the -- the purpose behind it was that there was  
8       some belief that natural resource damages are  
9       going to be an emerging issue and it was an  
10       attempt to get out front on -- on that issue in  
11       the same way that we're attempting to get out  
12       front on institutional controls.  But what we  
13       are to do about natural resource damages --  
14       what the DERTF wants -- you know, what the  
15       pleasure of the panel is on that, I'm not sure.

16               MS. PERRI:  And it relates, again, to  
17       a bigger issue -- you know, the DERTF just --

18 is working on these issues as it pertains to  
19 BRAC, but the issue of natural resource damages  
20 is pertinent to all cleanup sites regardless of  
21 them being federal or private.

22 GEN. HUNTER: So, is this action  
23 closed --

24 MS. PERRI: No. It's -- It's --

25 GEN. HUNTER: -- and another action

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1 follows on?

2 MS. PERRI: No. It's -- I think it's  
3 that we do not, probably, have the person or  
4 resources right now to address the natural  
5 resource damages issue as a DERTF -- and even  
6 though it's an emerging issue, we'll have to  
7 just table it as an idea.

8 GEN. HUNTER: So, we're keeping it  
9 open as an emerging issue?

10 MS. PERRI: Right.

11 GEN. HUNTER: Okay.

12 MR. CHOUDHURY: Okay. Yes. My  
13 recollection is it was NAAG that was -- put it  
14 on the table as something for the DERTF to take  
15 a look at.

16 The next one is: Research Institutional  
17 Controls Trends in RODs. This is assigned to  
18 EPA. I believe EPA has indicated that it

19 cannot complete this action item because  
20 information is not available in CERCLIS.

21 MS. PERRI: Okay.

22 MR. CHOUDHURY: Do you want to carry  
23 it as an open action item?

24 MR. WOOLFORD: I would like to carry  
25 it as a closed action item just because we

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1 don't have the data to do it.

2 MS. PERRI: Okay. So, we'll close  
3 it, unless anyone objects. I mean, it would be  
4 good to have. But if you don't have the  
5 information --

6 MR. GRAY: What, specifically, is it  
7 again? I don't have a list.

8 MS. PERRI: Here.

9 MR. CHOUDHURY: Okay. The action  
10 item description is: EPA will research  
11 the percent of RODs that contain institutional  
12 controls broken down by year, type of  
13 institutional control, type of site and the  
14 lead for cleanup (i.e., a private site, a  
15 federal facility or fund financed.)

16 MR. GRAY: Are you suggesting, Jim,  
17 that you don't have copies of all the RODs --

18 MR. WOOLFORD: Are you suggesting --

19 MR. GRAY: -- or is it you don't have

20 the resources to analyze them?

21 MR. WOOLFORD: Are you suggesting  
22 that -- yeah -- the resources is a big issue,  
23 because we would have to go through literally  
24 thousands of Records of Decisions and pull out  
25 that data. We don't have it systematically

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1 recorded in our database, which we had hoped --  
2 and that was -- I was -- when we took on the  
3 task, we had hoped we'd be able to pull this  
4 out of our database and we're not able to do  
5 that -- and I simply don't have the resources  
6 to go out and review thousands of RODs.

7 MR. GRAY: You don't even have the  
8 ability to determine whether there are  
9 institutional controls irrespective of all this  
10 other breakdown by year, type and so on?

11 MR. WOOLFORD: That is correct.

12 MS. PERRI: Right. There's just too  
13 many.

14 MR. GRAY: Does DoD have it?

15 MS. PERRI: No. We --

16 MR. EDWARDS: I would just point out  
17 that -- in my opinion, that says something  
18 about long-term monitoring.

19 MR. CHOUDHURY: Next open action item  
20 is: Review Regulator Comments on FOSTs/FOSLs.

21 This was an EPA lead --

22 MS. PERRI: Just -- Just a minute.

23 General Hunter has a question.

24 GEN. HUNTER: So, did we come to an  
25 agreement that this is open or closed?

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1 MS. PERRI: Well, it's -- I believe  
2 Jim requested that it be a closed item --  
3 because we don't have the resources to manually  
4 go through thousands of RODs to gather this  
5 information.

6 MR. GRAY: Well, I -- it seems to me  
7 that it's an important piece of information.  
8 I'm hesitant to see it as a closed item. We --  
9 We just had the same situation on another item  
10 and we decided to leave it as an open item --  
11 although we don't know exactly how we're going  
12 to do it at this point --

13 MS. PERRI: I think we can revisit  
14 it. But, again, I -- I would hate to leave it  
15 open because we know we -- we know what the  
16 volume is. With -- With Natural Resources  
17 Damages -- it's a broader policy question  
18 that's being developed in a variety of arenas  
19 that we could tap into. In the case of the  
20 RODs, I think it's literally specific documents  
21 and I -- again, I don't even know -- Jim, do

22       you have any assessment of how many there are,  
23       what kind of time frame we'd need -- you'd need  
24       to look through those and the money that would  
25       be involved?

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1               MR. WOOLFORD: I mean, we've been  
2       signing approximately -- EPA's been signing for  
3       the last ten years about 200 Records of  
4       Decisions a year.

5               MR. GRAY: Well, let me back up a  
6       minute. I'm concerned with it -- I mean,  
7       first of all, we wanted to have them on all of  
8       them if we could to see what's happening across  
9       the board -- but it would still be helpful, it  
10      seems to me, to the Task Force to, at least  
11      have that information, for the RODs involving  
12      closing military facilities, which is a much  
13      smaller number of RODs. Could we get it from  
14      DoD or -- or EPA or a combination of the two  
15      for -- for those facilities that are our  
16      primary focus, which are the -- the bases that  
17      are being closed?

18              MS. PERRI: Jim?

19              MR. WOOLFORD: I can speak to the  
20      NPL, because we're -- we don't get the  
21      Records of Decisions or the other decision  
22      documents for the non-NPL. The NPL is about a

23 third of the -- the total number -- about the  
24 bases we're working at -- in terms of  
25 Fast-Track bases, not all the bases. If we

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1 narrow it down to the NPL, I think it may be  
2 manageable for us to do. I don't know --  
3 have -- I don't have the numbers at my -- my  
4 fingertips, but I'd be willing to explore  
5 that. But that leaves a large universe --

6 MS. PERRI: Right.

7 MR. WOOLFORD: -- of state --

8 MR. GRAY: I understand. But I also  
9 agree with -- with Thomas. I -- It certainly  
10 shakes my confidence that we're going to be  
11 able to effectively monitor and enforce  
12 institutional controls where we don't even know  
13 where they are and how many there are and so  
14 on -- and I --

15 MS. PERRI: Right.

16 MR. GRAY: I'm flabbergasted --

17 GEN. HUNTER: It seems like to me we  
18 ought to build a database.

19 MS. PERRI: Exactly -- from scratch.

20 GEN. HUNTER: And maybe if we can't  
21 do it with in-house resources, maybe that's a  
22 contractual item that, you know, EPA or DoD can  
23 fund.



24 MS. PERRI: Somebody has still got to  
25 have the funds for the contractual item --

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1 GEN. HUNTER: Yeah.

2 MS. PERRI: -- and that's one of our  
3 issues. The DERTF doesn't have a funding  
4 source.

5 GEN. HUNTER: Okay.

6 MS. PERRI: In that sense that we  
7 don't -- we don't do -- we don't do that type  
8 of work.

9 MR. GRAY: Well, I think we ought to  
10 dedicate a portion of the surplus to it --

11 MR. CHOUDHURY: Please, one person at  
12 a time.

13 MR. GRAY: -- you know --

14 MS. PERRI: Surplus what?

15 MR. GRAY: The federal government  
16 surplus.

17 MS. PERRI: Oh, okay.

18 MR. PHILLIPPE: Is this the kind of  
19 thing that we could learn something from  
20 a -- I -- I -- pulling some ROD examples out  
21 of closing military base RODs and do a data  
22 call out there and just have folks summarize,  
23 "Where have you done" -- have -- put the  
24 question out, "Where have there been

25 institutional control languages in RODs," and

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1 have some summaries sent up from the field.

2 MS. PERRI: We can offer to do that.

3 But, again, I -- I'm not really sure what type  
4 of response we'd get. Going back to Jim's  
5 first point, if -- if you narrow it down --  
6 like, for example, just to the NPLs -- you're  
7 really not getting a representative sample.

8 I -- I can always ask the question, but I  
9 certainty can't commit the Service's resources  
10 to get this information.

11 MR. GRAY: Well, wouldn't DoD have  
12 the information regardless of whether it's an  
13 NPL or a state site? I mean, if you're the  
14 other party -- we're talking about DoD sites  
15 and we're talking about those at closing bases,  
16 you ought to have it regardless of whether it's  
17 an NPL site or not, it seems to me.

18 MR. CHOUDHURY: Mr. Gray, I think the  
19 issue is not institutional controls and how  
20 it's being handled in RODs or what-have-you as  
21 really a national -- you know, a national  
22 issue -- and there are trends -- and I think  
23 taking just a look at part of the picture is  
24 like touching a part of the elephant and -- and  
25 we may be drawing wrong conclusions and -- from

1           that.

2                   MS. PERRI: Right.

3                   MR. CHOUDHURY: To be valuable,  
4           I think we need to have an overall picture.

5                   MR. GRAY: It seems to me, we've had  
6           this conversation before and we went opposite  
7           positions on it.

8                   MS. PERRI: Right. But, again, I  
9           think there is a problem, General, in only  
10          looking at federal sites. I mean, there's --  
11          as Jim said, thousands of Records of Decisions  
12          on Superfund sites. This is an issue that  
13          relates to all cleanup sites, not just DoD.  
14          It's great that the DERTF is looking at it.  
15          But, again, there is a big -- a big world out  
16          there and the government -- the federal  
17          government needs to think about what is the  
18          national policy on institutional controls,  
19          which -- it's not at that level yet.

20                  GEN. HUNTER: Well, we may -- we may  
21          start to model that. We'll get the rest of the  
22          federal government to come into play here.  
23          You've got to start somewhere -- and if you're  
24          going to have a database for institutional  
25          controls -- I don't care if it's a small

1 database -- just to get a feel for what you're  
2 talking about looking at.

3 MS. PERRI: Right.

4 GEN. HUNTER: You know, I have no  
5 clue just from the discussion here --

6 MS. PERRI: If you -- Right.

7 GEN. HUNTER: -- that -- we're  
8 talking about enforcing institutional controls  
9 somewhere. Now, the current activity that's  
10 going on is -- is pretty easy to monitor, but  
11 you've had some activity -- action -- since the  
12 first BRAC if you want to just go back to BRAC  
13 and use that as a baseline to see what kind of  
14 effort it will require. I'm just throwing out  
15 a suggestion.

16 MS. PERRI: Right. Right.

17 Okay. Thomas?

18 MR. EDWARDS: And I would also point  
19 out that not all cleanups at federal facilities  
20 are of EPA lead.

21 MS. PERRI: Right.

22 MR. EDWARDS: There are many federal  
23 facilities -- closing bases -- that are not  
24 on the NPL -- all of those in Texas,  
25 for instance, are not on the NPL -- and it's

1       all state-led cleanups -- and, so -- EPA is  
2       certainly cognizant of the cleanups, but the  
3       Record of Decision is signed -- or the orders  
4       are signed by the state agency and by DoD.

5               MS. PERRI:  One thing, I guess, we  
6       could offer in line with revisiting the issue  
7       of -- of the Research on Institutional Controls  
8       is, "How might we approach a project to collect  
9       some information?"  We can always discuss that  
10      in the future.  But right now, I -- I -- it  
11      sounds like you've looked into it.  We can't  
12      respond properly right now and we need to think  
13      about it a little bit -- don't -- don't  
14      disagree that it's not important information --

15             MR. EDWARDS:  I agree with Don.  I  
16      don't think it should be closed.  I think it  
17      should be held as an open item for further  
18      study.

19             MS. PERRI:  Okay.

20             MR. EDWARDS:  Perhaps modify it in  
21      scope somewhat.  But --

22             MS. PERRI:  Okay.

23             MR. EDWARDS:  -- I think it's an  
24      issue.

25             MR. WOOLFORD:  I'd be willing to do

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1           that and I'd be willing to take suggestions  
2           from -- from the Task Force on that.

3                   MR. GRAY: Well, one -- one idea is  
4           you could do what you said you thought you  
5           could do -- and that is the NPL sites -- and,  
6           then, we can look elsewhere to get the non-NPL  
7           sites and, at least, we have a start.

8                   MR. WOOLFORD: I just would want  
9           to -- I appreciate that, Don. I just wanted  
10          more focus. Because looking at 2,000 RODs and  
11          going through 2,000 RODs over the last ten  
12          years and knowing the cost of that could become  
13          prohibitive as -- even through contractual  
14          resources -- to make that happen. It would be  
15          very expensive to do. But I'm not saying it's  
16          not worthwhile.

17                   MR. EDWARDS: It seems to me that  
18          DERTF is -- is the right point at which to  
19          start this -- because all the necessary  
20          players, I think, are around the table -- GSA  
21          and --

22                   MS. PERRI: No. We have a broad  
23          federal -- you know, every federal agency owns  
24          land -- the Treasury Department, the  
25          Agriculture Department, the Interior

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1 Department --

2 MR. EDWARDS: My comment was focused  
3 on closing military bases only and it seems to  
4 me that DERTF -- you know --

5 MS. PERRI: Right.

6 MR. EDWARDS: -- that's within the  
7 DERTF scope and the necessary players are  
8 around the table.

9 MS. PERRI: Right. Okay. Well,  
10 we'll leave it open and explore it.

11 MR. WOOLFORD: Why don't I develop  
12 some proposals to bring back to the group for  
13 what we can do --

14 MR. GRAY: That's the ticket.

15 MS. PERRI: Okay. Shah?

16 MR. WOOLFORD: -- and try to cost  
17 them out?

18 GEN. HUNTER: We'll attempt that.

19 MR. WOOLFORD: Okay.

20 MR. CHOUDHURY: All right. So, EPA  
21 to provide a proposed plan.

22 MR. WOOLFORD: Some options.

23 MR. CHOUDHURY: The next item is:  
24 Review of Regulatory Comments on FOSTs/FOSLs.  
25 This was an EPA action assigned in the

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1 January, '98, DERTF meeting. The description

2 is: EPA will examine regulator comments on  
3 FOSTs/FOSLs to identify any existing trends in  
4 the comments and provide the results to DoD.

5 MR. WOOLFORD: And that is still an  
6 open action item.

7 MR. CHOUDHURY: Okay.

8 MR. WOOLFORD: We're still working on  
9 that.

10 MR. CHOUDHURY: Next is -- is  
11 titled: Develop Fact Sheet Based on EPA CERFA  
12 Guidance. Again, assigned January, '98, to  
13 EPA. EPA to develop a fact sheet based on the  
14 March, '97, EPA CERFA guidance to assist  
15 regulatory staff in providing input/comments to  
16 FOSTs/FOSLs, emphasizing that no response  
17 action is needed for minimal releases.

18 MR. WOOLFORD: Open.

19 MR. CHOUDHURY: It's still an open  
20 action item?

21 MR. WOOLFORD: Yes.

22 MR. CHOUDHURY: The next one:  
23 Develop Lead-Based Paint Guidance. We talked  
24 about it yesterday -- which is to switch the  
25 lead to DoD.

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1 The next open action item is titled:  
2 State Self-Certification Programs, assigned to



3       NAAG at the last meeting, July, '98. NAAG is  
4       to provide an information paper on the utility  
5       of and NAAG's experience and success with state  
6       programs involving state self-certification or  
7       self-reporting of institutional controls.

8               MR. EDWARDS: We had some problems  
9       with this because the assignment seemed rather  
10      vague. I think we finally figured what it is  
11      that you're asking for and I will go back to  
12      NAAG with that request.

13             MS. PERRI: Okay.

14             MR. CHOUDHURY: Okay. The last one  
15      is titled: Life Cycle Model for Institutional  
16      Controls, assigned to EPA at the last meeting  
17      and this action asks EPA to organize a panel on  
18      life cycle models for institutional controls  
19      for this meeting.

20             MR. WOOLFORD: Yes. And we  
21      investigated that. In fact, we talked with  
22      several other EPA offices and, basically, they  
23      told us they had no real experience in life  
24      cycle costing and they suggested, actually, we  
25      talk to the Corps of Engineers and the response

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1       that I got from -- from the Corps was that they  
2       didn't think that they were also in a position  
3       to do that just at this time because there's

4 not a lot of experience with it.

5 Quite frankly, I'm not sure what to do  
6 with it because we don't have any -- any  
7 expertise out there to do it -- unless,  
8 you know, there's some other source within the  
9 Corps that they could do it, but that's --  
10 that's where it stands.

11 MS. PERRI: Okay. What do you-all  
12 want to do with this item? I -- Would you like  
13 to, General, take it back to the Corps and  
14 investigate it further?

15 GEN. HUNTER: Yeah. Why don't we do  
16 that?

17 MS. PERRI: Okay. Great.

18 MR. CHOUDHURY: Okay. That was the  
19 last open action item.

20 There's an action on the --

21 MS. PERRI: Principles?

22 MR. CHOUDHURY: -- on the principles  
23 document from yesterday that was deferred.  
24 Mr. Gray and I have discussed some of his  
25 language. I believe what was offered yesterday

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1 was that his language be incorporated and the  
2 principles document be circulated for two weeks  
3 or so for further -- final review by the DERTF  
4 members -- and, then, published, pending

5           comments.

6                       MS. PERRI:   Don?

7                       MR. GRAY:   Just a comment on that.

8           The language is language that is -- in  
9           recommendation to the previously -- or findings  
10          that have previously been adopted by the  
11          DERTF -- and -- and Mr. Choudhury had  
12          incorporated it into the final coordination  
13          draft, but he had incorporated it as subsidiary  
14          items under the seven pre-existing principles.  
15          In looking at the introduction to that  
16          document, it's my belief that -- that those  
17          things fit the description under Paragraph 2,  
18          which says, "What are" -- "What are the  
19          principles," and it says, "They are broad  
20          enduring statements that highlight the issues  
21          that DERTF believes to be essential to the  
22          success of environmental cleanup at BRAC  
23          installations."

24                      I had submitted my written comments.  I  
25          would ask that when we circulate it that they

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1           be put in as separate principles and let  
2           everybody decide for themselves whether they  
3           think they rise to that level or not.  And if  
4           they do, then we will have not seven  
5           principles, but ten principles and we can

6 rename it the Ten Commandments.

7 MS. PERRI: Okay. So -- Paul?

8 MR. REIMER: With respect, though, to  
9 the action that was taken yesterday, Shah, I  
10 thought in addition to incorporating Mr. Gray's  
11 points that we were also -- you -- were  
12 also -- or staff -- was also to look at this  
13 in terms of the manner in which it's stated,  
14 assuming that there was some ongoing value in  
15 crafting this as a part of the on -- the  
16 administration interest in having two more BRAC  
17 rounds. In other words, that this is -- it's  
18 just not enduring principles. It's the sort of  
19 thing that will be helpful if and when Congress  
20 goes ahead with the two more rounds of closure.

21 MR. CHOUDHURY: Mr. Reimer, that is,  
22 of course, one of the uses of this as a  
23 stand-alone document. That is what I was  
24 suggesting. I think there can be many, many  
25 uses made of -- of the final product -- and

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1 that certainly would be one.

2 MR. REIMER: So, you're telling me  
3 you're not going to rewrite it and -- or --  
4 or put that caveat on it?

5 MS. PERRI: What you're asking is  
6 that he put a sentence in the document

7 saying --

8 MR. REIMER: Yeah.

9 MS. PERRI: -- that we specifically

10 recommend that the administration look at this

11 in developing their future rounds of BRAC.

12 That's all you're saying, right?

13 MR. REIMER: That's it.

14 MS. PERRI: Okay. That -- That,

15 I think we can do. We'll put it in the

16 draft -- and we know there are going to be --

17 that there's many steps to base closure and

18 that Congress is only the first one. So,

19 that's fine.

20 MR. CHOUDHURY: Okay.

21 MS. PERRI: That's it.

22 MR. CHOUDHURY: I have no other

23 action -- or business items at this point.

24 MS. PERRI: Okay. We will adjourn

25 now and we will reconvene at --

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1 MR. REIMER: Wait. Are -- Are you

2 going to ask if we have any others to add or --

3 MS. PERRI: Oh, yes -- yes. Would

4 you like to add some more?

5 MR. REIMER: I would. And maybe some

6 of our other -- others would like to, as well.

7 MS. PERRI: To the principles

8 document?

9 MR. REIMER: No, no. Only to the  
10 business items -- the open items for further  
11 research and -- and discussion and -- and  
12 back -- and reporting back information from  
13 staff.

14 MS. PERRI: Okay.

15 MR. REIMER: One has to do with the  
16 potential of monitoring the Section 334 early  
17 transfers --

18 MS. PERRI: Okay.

19 MR. REIMER: -- where they are, how  
20 they've gone, their relative success.

21 MR. PHILLIPPE: That's a short  
22 assignment.

23 MS. PERRI: Who's going to do that?

24 MR. REIMER: But we hope it might get  
25 bigger.

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1 MS. PERRI: Do you want to monitor --

2 MR. WOOLFORD: Paul, if I may -- are  
3 you interested in the ones that have actually  
4 gone through --

5 MR. REIMER: Sure.

6 MR. WOOLFORD: Are you also  
7 interested in the ones that are in process and  
8 the ones that are being contemplated? Because

9           there are pretty few -- I mean, Stan's right --  
10          very few have gone through. But I know that as  
11          I've -- as I've been hearing rumblings from the  
12          field, there are more that are being considered  
13          and that -- that may be a much larger universe  
14          that may be interesting to capture.

15                 MR. REIMER: Jim, I was thinking only  
16          of those that are essentially in place. It  
17          would be well if we had that to establish how  
18          this is playing out as a potential tool. I  
19          didn't anticipate that to -- anticipatory  
20          approach that you --

21                 MR. GRAY: The way things are going,  
22          Paul, let's don't turn down --

23                 MR. REIMER: Yeah. That's right. If  
24          you --

25                 MR. CHOUDHURY: Please, one at a

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1          time.

2                 MR. REIMER: -- let's do it.

3                 MS. PERRI: Okay.

4                 MR. WOOLFORD: But it -- it would  
5          be -- it would have to be a service lead. It  
6          could not be an EPA lead because there's  
7          certain requirements to coordinate with the  
8          states on the non-NPL and with EPA on that.

9                 MR. REIMER: That's -- Absolutely.

10           So, is it only possible to do it on the basis  
11           of those that are -- that have been done or --  
12           I -- that was my first thought.

13                     MS. PERRI:  Yeah.  I -- I think so.  
14           I think so.

15                     MR. REIMER:  And, then, maybe there  
16           will be volunteering of information if we see  
17           others coming.

18                     Okay.  I think there's a question -- and  
19           I'm not sure, Karla, how strongly you're --  
20           you're going to run -- bring this back to  
21           DERTF -- but on the continuity of funding issue  
22           for cleanup and the -- kind of the devolvment  
23           of this to the Services, number one -- and,  
24           number two, that it's also got a -- now, a -- a  
25           circumstance of when it's spent rather than --

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1           than -- in other words, you've got to be --  
2           you've got to allocate it and get it into the  
3           contractual scheme before it turns out to be an  
4           expenditure, if I understand it.

5                     MS. PERRI:  I think -- What are you  
6           referring to?  This -- The funding of the BRAC  
7           program?

8                     MR. REIMER:  Yes.

9                     MS. PERRI:  Right.

10                    MR. REIMER:  The BRAC cleanup



11 program --

12 MS. PERRI: Right.

13 MR. REIMER: -- to its completion.

14 MS. PERRI: Right. We -- Again,  
15 we're -- we've sent legislation up to the Hill,  
16 requesting that they continue to fund the  
17 program through the year 2005, which is when  
18 all the cleanups are expected to be completed  
19 at the current BRAC sites for all the rounds  
20 and -- you're right -- the -- the money --  
21 once that's passed by Congress, then the money  
22 would also have to be appropriated for that and  
23 we're --

24 MR. REIMER: Yeah. But it's going to  
25 come back through MILCON now rather than a BRAC

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1 budget -- BRAC cleanup budget.

2 MS. PERRI: Right. I think we -- I  
3 will have to defer discussion on that -- that  
4 issue for right now on how we're going to work  
5 that out, but the money that the Services have  
6 committed to cleanup in -- in their planned  
7 budgets through the next six years for BRAC  
8 sites -- they are committed to allocating and  
9 appropriating for that cleanup. So, right now,  
10 we expect that the money will be there and we  
11 are going to ask -- we've asked the Services to

12 give us their comments on how they want to  
13 implement this change in procedure where we  
14 only appropriate the money at the time the  
15 money is due rather than in advance and we're  
16 waiting for that feedback.

17 MR. REIMER: Okay. My only point,  
18 then -- that will be a -- of interest --

19 MR. CHOUDHURY: Mr. Reimer,  
20 microphone, please.

21 MR. REIMER: -- that will be of  
22 interest to DERTF.

23 MS. PERRI: Oh, absolutely.  
24 Absolutely.

25 MR. REIMER: Third item: On the --

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1 where the DSMOA funding -- the devolvment has  
2 occurred to the Service level -- I wonder,  
3 particularly in light of the potential for  
4 multiple -- multi-agency agreements -- such as  
5 was brought out in Pennsylvania's  
6 presentation -- should this whole question of  
7 where the DSMOA funding comes from and who  
8 handles it be subject to additional review?  
9 I'd like to see that come back as an item  
10 for -- for -- at least information to DERTF.

11 MS. PERRI: Okay. I mean -- I guess  
12 we -- we -- Well, as long as we're talking

13 about that, I'll point out a couple of things.  
14 Stan was right. They only get about 27 to  
15 30 percent of the total DSMOA money for  
16 California, but as a total, it's -- it's --  
17 it's large for BRAC since you have about a  
18 third of the BRAC sites.

19 Pennsylvania is able to refund the money  
20 to the Defense Department because they have  
21 this tax that allows the state to hire people  
22 to handle the oversight. California has a law  
23 that prohibits the state from actually  
24 appropriating money to work on any federal  
25 issue, whether it's BRAC cleanup oversight or

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1 anything else. That's just state law in  
2 California. The federal government can give  
3 California all the responsibility it wants to  
4 and, then, they have to pay for it. That's the  
5 way they've worked it out. Pennsylvania has  
6 done it differently, which is why we -- we fund  
7 the DSMOA in California to the extent we do.

8 Is that correct, Stan?

9 MR. REIMER: But that's not my  
10 issue. In this case, two years ago -- up until  
11 two years ago, DSMOA was funded through DoD and  
12 your office.

13 MS. PERRI: Okay.

14 MR. REIMER: Two years ago, it was  
15 devolved to the Services. I think that's worth  
16 revisiting.

17 MS. PERRI: Okay.

18 MR. REIMER: And the last item is --  
19 is an update on what the impact -- as -- as  
20 best can be seen of the -- of the -- the RIFS  
21 requirement now associated with UXO.

22 MS. PERRI: Okay.

23 MR. REIMER: Those are my four items.

24 MS. PERRI: You would like to bring  
25 those up in the future?

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1 Okay.

2 MR. CHOUDHURY: Thank you.

3 MS. PERRI: Does -- Does that --

4 MR. CHOUDHURY: Can I quickly review  
5 it?

6 MS. PERRI: Sure.

7 MR. CHOUDHURY: The one on early  
8 transfer -- there's already a standing update  
9 as-needed action item on that.

10 Mr. Reimer's requesting a briefing or  
11 information paper on BRAC funding -- the future  
12 of BRAC funding, a paper on DSMOA funding --  
13 and -- and just for clarification, BRAC has --  
14 nothing has changed in how BRAC funding is

15 handled in -- in DSMOA. It's the same as it  
16 was three years ago. And, then, an update on  
17 UXO clearance as the fourth action item.

18 MS. PERRI: You just want to know  
19 what we're doing on UXO, right -- the cleanup  
20 and --

21 MR. REIMER: Exactly. And the --

22 MS. PERRI: Okay.

23 MR. GRAY: He's talking about in the  
24 specific context of the court decision, aren't  
25 you, Paul?

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1 MS. PERRI: All right.

2 MR. ROGERS: Maybe I can help clarify  
3 a little bit. I mean, what was done at  
4 Fort Ord was simply an agreement in the  
5 circumstances of that case only. It's not  
6 at -- at this point, a determination that will  
7 apply to all UXO cleanups.

8 MS. PERRI: Right.

9 MR. GRAY: I think that's the  
10 question he's raising.

11 MR. ROGERS: So -- I mean, in terms  
12 of --

13 MR. CHOUDHURY: Mr. Gray --

14 MS. PERRI: So, you're -- you're  
15 answering it?

16 MR. CHOUDHURY: -- mike, please.  
17 MS. PERRI: I think, Steve, you're  
18 answering --  
19 MR. ROGERS: Well, I just want to  
20 make sure we're -- it's clear --  
21 MS. PERRI: -- Paul's question.  
22 MR. ROGERS: -- in -- in terms of  
23 what was done. In that litigation, the  
24 position that was put before the court was  
25 that -- a determination in that case at that

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1 site -- and at this point, it's -- I'm -- at  
2 least from legal perspective, that's all that  
3 has been said and all the -- the only  
4 commitment made. It's not a decision.  
5 MR. GRAY: It may not be binding  
6 other places, but it could --  
7 MR. ROGERS: Correct.  
8 MR. GRAY: -- be cited as a precedent  
9 in other cases.  
10 MR. ROGERS: Correct.  
11 MS. PERRI: Okay.  
12 MR. ROGERS: But I want to make sure  
13 that's clear. Because I think there was some  
14 discussion earlier about whether or not the  
15 position that we took before the court was that  
16 we're now interpreting CERCLA differently or

17 UXO differently. No. It was a decision to,  
18 in that case, do something. But that's not a  
19 formal determination that that's an  
20 interpretation that applies everywhere.

21 MS. PERRI: But if your question is  
22 broader, "What is DoD doing to plan for UXO  
23 cleanup?" That's certainly something we can  
24 address and explain.

25 MR. REIMER: I think it may be more

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1 specific, "What is DoD" --

2 MR. CHOUDHURY: Mr. Reimer --

3 MR. REIMER: -- "doing about the  
4 funding and whether that" -- "and how that  
5 funding stream is to come?"

6 MS. PERRI: Okay. And just briefly,  
7 I can let you know that in their budgets this  
8 year, the Services are having a separate line  
9 item for UXO cleanup. That line item means  
10 that they will not take money from their DERA  
11 or BRAC accounts and shift it to UXO. They  
12 have to have a new funding source and they are  
13 to start planning for UXO cleanup. So, it's  
14 a -- it's a third funding source in the cleanup  
15 program and it's just starting in the budgets  
16 this year. If it -- of course, we're now just  
17 starting the budget process. So, we don't know

18 if Congress will approve that.

19 MR. REIMER: Well, Karla, I think  
20 the -- the main issue, then, is that with this  
21 information that you two have provided,  
22 you've -- you've helped to focus some  
23 attention -- you know, give us some  
24 background. I guess my thought is that this  
25 seems like it was not volunteered, if you will,

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1 it wasn't a part of what we were going to be  
2 discussing at DERTF or you were going to bring  
3 us.

4 MS. PERRI: Right.

5 MR. REIMER: So, if I've only done  
6 one thing by suggesting to you that this is the  
7 sort of information in some continuity that I  
8 think DERTF needs, then I hope I'm pulling your  
9 coattails to have you recognize the connection  
10 between what we think DERTF is about and  
11 what -- and the -- the impact of this sort of  
12 information.

13 MS. PERRI: Okay.

14 MR. CHOUDHURY: Ms. Perri, I believe  
15 Mr. Newsome can add something to this  
16 discussion.

17 MS. PERRI: Okay. Thank you.

18 MR. NEWSOME: I'm Rick Newsome,



19 Department of the Army.

20 Paul, I would -- I would maybe bring to  
21 your attention the situation at Fort Ord and  
22 what's -- Karla is now talking about is really  
23 not applicable to BRAC. The funds for service  
24 and BRAC -- UXO response actions as funded is  
25 part of the BRAC budgets and it -- it has been

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1 ever since there has been a BRAC program. So,  
2 in terms of -- and what I understand the DERTF  
3 is focusing on -- is the BRAC -- cleanup of  
4 BRAC properties. The -- The issue of Service's  
5 programming money for Range Rule implementation  
6 is -- is not on target -- because we've been  
7 programming money and will continue to do so as  
8 part of our BRAC budgets.

9 MS. PERRI: So -- So, Rick was kindly  
10 correcting my misstatement.

11 MR. NEWSOME: Well, I amplify to  
12 clarify.

13 MS. PERRI: Thank you. What he is  
14 saying is that BRAC cleanup has included funds  
15 to clean up UXO all along and will continue to  
16 do so.

17 MR. NEWSOME: That's the plan, yes.

18 MS. PERRI: Okay.

19 MR. REIMER: Which will now be in the

20 MILCON budget.

21 MR. NEWSOME: Well, it's part of our  
22 BRAC program request, which is in the MILCON  
23 request, yes. BRAC dollars have been -- or  
24 historically requested as part of the BRAC  
25 MILCON.

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1 MR. WOOLFORD: That -- That -- Okay.  
2 Now, I'm confused, Rick. So, help me out here,  
3 please.

4 Now, there's money in the BRAC budget to  
5 cover UXO and, then, there's UXO on FUD sites  
6 and there's UXO on active sites. Could you  
7 help sort this out for me? I mean, what's  
8 happening with the funding of the inventory and  
9 the responses and all that? Are those -- and,  
10 then, I heard there's a line item in the budget  
11 for BRAC -- I mean, for UXO. So, I'm trying to  
12 figure out how this -- how is -- is -- is the  
13 money in the -- in the line item in the budget  
14 for FUDS and active sites --

15 MR. NEWSOME: No.

16 MR. WOOLFORD: -- minus -- Okay.  
17 Help me out there.

18 MR. NEWSOME: It's -- It's for --  
19 the -- the line item in the budget is for  
20 active sites, closing -- closed -- for what

21 would be determined to be the inventory of  
22 closed ranges in -- for active sites.  
23 FUDS already gets a unique FUDS account,  
24 which would have to be attached for that  
25 purpose, and, also, BRAC, then, as I explained

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1 a moment ago, has its own account that -- that  
2 addresses UXO requirements.

3 MR. WOOLFORD: So, in terms of doing  
4 this survey that's required by the Range Rule  
5 and which we heard was starting, then that  
6 money will be taken out of the FUDS account,  
7 out of the BRAC line item and out of the --  
8 the -- all -- various other accounts?

9 MR. NEWSOME: Well, the other account  
10 that -- that I'm talking about is -- is not --  
11 not clear -- you know, we'd have to get  
12 Congressional authority to have that and  
13 that -- that's not in until the FRRO budget,  
14 but for FUDS and -- and -- and BRAC, yes,  
15 they would use funds available to that program  
16 for that purpose.

17 MR. CHOUDHURY: To further amplify  
18 Ms. Perri's remarks, what -- I believe what we  
19 are talking about is more arcane internal to  
20 DoD on how we build the budgets and how the  
21 different lines are then summed up to what goes

22 to -- to Congress. So, it's more a matter of  
23 internal accounting and cost -- you know,  
24 coding -- rather than talking about FUDS and  
25 then BRAC than as a -- you know, separate line

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1 item that is going to appear in the DoD  
2 budget. It's how we build the account or the  
3 funding from bottom up.  
4 MR. NEWSOME: Right.  
5 MR. REIMER: Well, my -- my only  
6 concern in terms of what our responsibility --  
7 DERTF's responsibility -- and the report that  
8 we send to Congress each year is -- is at -- at  
9 what point are we either clear -- totally  
10 clear -- that we do not include the -- the UXO  
11 cleanup as part of that package of funding that  
12 we keep appealing to Congress to continue to  
13 send our way -- and my problem here is that the  
14 minute that you move to an RIFS approach, if  
15 that is going to become a factor, then it seems  
16 to me you've crossed the line that now you have  
17 expanded the CERCLA responsibilities or you --  
18 in other words, the picture is bigger. Even to  
19 the extent that if it only applies at Fort Ord,  
20 that's a big addition -- I mean, there are a  
21 lot of dollars that are associated with that  
22 that, I guess, the question is: Is it

23 reflected in what we should be reporting to  
24 Congress?

25 MR. NEWSOME: In the case of

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1 Fort Ord, it will be part of the Army's BRAC  
2 budget request. If there are additional  
3 requirements there for RIFS -- which there  
4 will be -- and we are -- they're outside of  
5 what we currently have in our program budget --  
6 we will, then, identify that additional funding  
7 request to Congress in subsequent budgets.

8 MR. REIMER: Then -- Then, Rick, do  
9 I -- would I reach the conclusion that under  
10 this new form of -- of how the funding is -- is  
11 accomplished or how it's handled -- that there  
12 is no longer any need for DERTF to report to  
13 Congress on the BRAC cleanup budget because we  
14 haven't got one?

15 MR. CHOUDHURY: Mr. Reimer, I'm not  
16 really sure I understood that statement.

17 MS. PERRI: I'm confused.

18 MR. NEWSOME: I know I didn't.

19 MR. REIMER: No. The report, then,  
20 is that it goes to the Congress as the BRAC  
21 funding and there is no BRAC environmental  
22 account?

23 MS. PERRI: No.

24 MR. CHOUDHURY: Let me -- Let me --  
25 MS. PERRI: There is.

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1 MR. CHOUDHURY: -- see if I can  
2 answer that question.  
3 Right now, funding for environmental  
4 efforts at BRAC installations is paid out of  
5 the BRAC account. BRAC Environmental is one  
6 line in the BRAC account. The overall BRAC  
7 funding is within the MILCON appropriation.  
8 Currently, the secretary's authority to  
9 implement BRAC actions expires in July, '01.  
10 Okay? That is the authority to -- to close or  
11 realign military installations. Okay? That is  
12 separate from budget authority and funding of  
13 environmental restoration activities.  
14 MR. GRAY: It's an authorization act,  
15 not a budget appropriations act.  
16 MR. CHOUDHURY: Okay. Now, if  
17 everybody's with me, let me take it -- the next  
18 step.  
19 The department goes through an annual  
20 process in building the budget and, then,  
21 forwarding our funding request to Congress and,  
22 then, Congress takes that and provides us  
23 the -- you know, appropriations as they deem  
24 fit against the requirements that we present to

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1 does as a matter of course in program --  
2 managing our programs -- and BRAC environmental  
3 efforts being one program that we manage.

4 MS. PERRI: Right. BRAC environment  
5 comes under the large BRAC account.

6 MR. REIMER: In the Measures of Merit  
7 that we include in our report to Congress, we  
8 are dealing with what our assumptions are as to  
9 how far down the line it's going to go to  
10 complete the funding of the BRAC cleanup.

11 MR. CHOUDHURY: Our -- if I can  
12 address that -- our current projections as was  
13 discussed, I believe, at -- at our last DERTF  
14 meeting was after '01, we were showing  
15 approximately 2.4 in environmental restoration  
16 efforts or requirements beyond '04 and the  
17 annual amounts that would be required to fund  
18 ongoing actions at BRAC installations would be  
19 forwarded to Congress, you know, each year --  
20 you know, whether --

21 MR. REIMER: I -- I understand that,  
22 Shah. And, so, now if I can return to where I  
23 started: Is there likely to be an impact on  
24 that funding as we see it projecting out in  
25 respect to UXO?

1                   MR. NEWSOME: On the BRAC budget, no,  
2                   we don't see an increase on the current BRAC  
3                   budgets that we've currently got programmed.

4                   MR. REIMER: Let's keep in touch with  
5                   that.

6                   MS. PERRI: Okay. Does anyone have  
7                   any other issues they'd like to raise?

8                   MR. POLLY: If I may, early transfer  
9                   authority where -- early transfer authority.  
10                  What Paul and I are interested in -- and we're  
11                  not going to go away -- this gives us an  
12                  opportunity to help the Services, to help the  
13                  locality, move property -- and what we're  
14                  looking at is how quickly through the Services  
15                  and, particularly, DoD we can get approval for  
16                  these early transfer authorities to happen.  
17                  Because right now, I have two specific issues  
18                  I'm working on -- one with Army, one with  
19                  Navy -- and the big concern we have is the  
20                  bureaucracy has -- may have taken over and we  
21                  want to make sure that's not the case -- that  
22                  we're able to move the properties quickly.  
23                  Because the IOC is doing their job, NAVFAC is  
24                  doing their job and we want to make sure we can  
25                  get it up through the chain of command and out



1 as quickly as possible. So, what Paul and I  
2 are looking for is somebody, please, monitor  
3 that and let us know periodically on how well  
4 we're doing. Okay?

5 MS. PERRI: Sure.

6 MR. CHOUDHURY: Noted.

7 MR. EDWARDS: And I think Shah said  
8 that was incorporated in another item. Which  
9 other item is that incorporated in?

10 MR. CHOUDHURY: There's two standing  
11 update-as-needed action items -- one to EPA,  
12 one to DoD -- which is to provide updates as  
13 needed on use of early transfer authority.

14 MS. PERRI: Okay.

15 MR. EDWARDS: So, I guess we're  
16 saying now it's needed?

17 MS. PERRI: No. We -- We actually  
18 have it on our tracking list.

19 MR. EDWARDS: Yeah. So -- So, the  
20 as-needed becomes needed?

21 MS. PERRI: Okay. You'll get an  
22 update.

23 Any other items from anyone?

24 MR. CHOUDHURY: If not, I would now  
25 propose a recess until we reconvene for public

1 comment at 5:30.

2 By unanimous consent, recess --

3 MS. PERRI: 5:30 promptly. We will  
4 start at -- promptly at 5:30.

5 (Meeting adjourned.)

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